In the Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-312

CORENSWET, INC.,
Petitioner

versus

AMANA REFRIGERATION, INC.
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The petitioner, Corenswet, Inc., prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceedings on April 30, 1979.

OPINIONS BELOW

The opinion of the Fifth Circuit, entered on April 30, 1979, is reported at 594 F.2d 129. It is reprinted in Appendix A hereto, p. A-1, *infra*.

The District Court for the Eastern District of Louisiana rendered an oral but unreported ruling on November 30, 1976, in the course of granting a preliminary injunction. Those oral remarks are printed in Appendix B hereto, p. A-27, *infra*. Also printed in Appendix B are three unreported orders of the District Court: (1) the preliminary injunction dated February 28, 1977; (2) the clarification and modification order dated August 18, 1977; and (3) the clarifica-

tion and modification order dated November 18, 1977.

JURISDICTION

The judgment of the Fifth Circuit was entered on April 30, 1979. On May 30, 1979, the Fifth Circuit denied a timely filed petition for rehearing en banc or, alternatively, for rehearing by the assigned panel. See Appendix A hereto, p. A-25 *infra*. This petition for certiorari is being filed within 90 days of the denial of rehearing.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

All 52 state and federal jurisdictions that have adopted the Uniform Commercial Code have incorporated the Code's basic purpose "to make uniform the law among the various jurisdictions". They have also incorporated the obligation of good faith that the Code requires be observed in the performance and enforcement of all contracts. There are no express exceptions in the Code to the applicability of that obligation, which cannot be disclaimed even by the parties. The questions here presented are:

1. Whether a federal diversity court, in applying the law of a state that recognizes no exception to the Code's good faith obligation, can create a new and unprecedented exception to that obligation so as to permit a national franchisor to enforce the termination provisions of a franchise agreement, of unlimited duration, in an arbitrary and bad faith manner.

2. Whether the provision of the Code that contracts of indefinite duration "may be terminated at any time by either

party" constitutes an implied exception to the Code's good faith obligation so as to permit termination of a franchise agreement, of unlimited duration, in a manner that is concededly arbitrary and in bad faith.

STATUTES INVOLVED

Uniform Commercial Code, as enacted in Iowa, Iowa Code Annotated (I.C.A.), § 554.1101, *et seq.* [Bold face emphasis added.]

§ 1-102 (I.C.A. §554.1102):

(1) This chapter shall be liberally construed and applied to promote its underlying purposes and policies.

(2) UNDERLYING PURPOSES AND POLICIES OF THIS CHAPTER ARE:

(a) to simplify, clarify and modernize the law governing commercial transactions;

(b) to permit the continued expansions of commercial practices through custom, usage and agreement of the parties;

(c) TO MAKE UNIFORM THE LAW AMONG THE VARIOUS JURISDICTIONS.

(3) THE EFFECT OF PROVISIONS OF THIS CHAPTER MAY BE VARIED BY AGREEMENT, except as otherwise provided in this chapter and EXCEPT THAT THE OBLIGATIONS OF GOOD FAITH, diligence, reasonableness and care prescribed by this chapter MAY NOT BE DISCLAIMED BY AGREEMENT but the parties may by

agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.

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§1-203 (I.C.A. §554.1203):

EVERY CONTRACT OR DUTY WITHIN THIS CHAPTER IMPOSES AN OBLIGATION OF GOOD FAITH IN ITS PERFORMANCE OR ENFORCEMENT.

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§1-205 (I.C.A. §554.1205):

(4) The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable express terms control both course of dealing and usage of trade and course of dealing controls usage of trade.

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§2-208 (I.C.A. §554.2208):

(2) The express terms of the agreement and any such course of performance, as well as any course of dealing and usage of trade, shall be construed whenever reasonable as consistent with each other, but when such construction is unreasonable, express terms shall control course of performance and course of performance shall control both course of dealing and usage of trade.

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§2-302 (I.C.A. §554.2302):

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

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§2-309 (I.C.A. § 554.2309):

(2) WHERE THE CONTRACT provides for successive performances but IS INDEFINITE IN DURATION, IT is valid for a reasonable time but unless otherwise agreed MAY BE TERMINATED AT ANY TIME BY EITHER PARTY.

(3) Termination of a contract by one party except on the happening of an agreed event requires that reasonable notification be received by the other party and an agreement dispensing with notification is invalid if its operation would be unconscionable.

STATEMENT OF FACTS

This is an account of the creation, through the exercise of federal diversity jurisdiction, of a precedent of far-reaching significance to the development of both federal and state law respecting franchising. It is a precedent that gives legal impunity to an interstate franchisor who disregards its obligation of good faith when seeking to terminate a distributor's agreement. An influential federal appellate court has held that the broadly based concept of good faith, a concept engrained in the Uniform Commercial Code and a host of federal and state statutes dealing with franchise agreements, does not forbid "bad faith" or "arbitrary" terminations, at least where such agreements have no defined duration.

This action was originally brought in a Louisiana state court by Corenswet, Inc., a wholesale franchisee and the petitioner herein. The defendant in the action was the respondent Amana Refrigeration, Inc., a nationally known manufacturer and franchisor of major household appliances. On Amana's petition, the suit was removed to the federal court for the Eastern District of Louisiana on the basis of the diverse citizenship of the corporate parties. [1] Prior to removal, the state court had issued a temporary restraining order barring termination of the distributorship agreement. That order was continued in effect by the federal court after removal and until the issuance of the preliminary injunction, which was ultimately the subject of the appeal to the Fifth Circuit.

1. Corenswet is a Louisiana corporation with its domicile in New Orleans. Since 1972, it has been a wholly-owned subsidiary of Select Brands Industries, Inc., a Missouri corporation. Amana, a wholly-owned subsidiary of Raytheon Company, Inc., is a Delaware corporation with its principal place of business in Amana, Iowa.

The facts are largely undisputed. In 1969 Amana solicited Corenswet, a reputable local distributor, to distribute the Amana line (refrigerators, freezers, microwave ovens and room air conditioners) in south Louisiana. Corenswet agreed and signed Amana's standard form printed agreement. When Corenswet agreed to become Amana's distributor, Amana assured Corenswet that the relationship would be lasting, that the agreement would continue in effect as long as Corenswet performed satifactorily and that Corenswet would reap the benefits of its labors in marketing Amana's products. 1538 App. 384, 558-560.[2]

In agreeing to become Amana's distributor, Corenswet realized that it would have to make substantial monetary investments and devote much time and effort to the development of a market for Amana products in southern Louisiana, and Corenswet also anticipated that it would operate at a loss for the first several years with the Amana line of products, the expectation being that the distributorship would ultimately become profitable.

These expectations proved accurate, save for Corenswet's ultimate profits which were thwarted by Amana's arbitrary and bad faith termination. From 1969 through August of 1976, Corenswet invested about $1.5 million to develop the market for Amana products. It increased from 6 to 72 the number of Amana retail dealer outlets in southern Louisiana, and increased the sales of Amana products in that area from $200,000 in 1969 to $2.5 million in 1976. Indeed, Amana repeatedly praised and complimented Corenswet on the fine

2. Since there were two separate appeals to the Fifth Circuit by Amana (see footnote 5, *infra*), numbered 77-1538 and 77-3474, there were two separate appendices filed below. References herein to those separate appendices are designed "1538 App.____" and "3747 App.___."

job it was doing under the distributorship agreement, and the District Court was later to find that Corenswet had unquestionably done "a satisfactory job". See Appendix B hereto, p. A-38, *infra*. But Corenswet's profits on the Amana line, which first emerged in 1975 and 1976, were never sufficient to recoup Corenswet's developmental expenses.[3]

From time to time Amana unilaterally revised its printed form of distributorship agreement and required its distributors to sign the revised forms. None of the provisions of any of the form agreements were negotiable, and no Amana distributor had ever succeeded in changing any of the provisions. 3474 App. 25-26, 174, 497, 529-30. A distributor's refusal to sign any agreement as drafted or revised by Amana meant cancellation of the distributorship. 3474 App. 161, 411, 493-94.

The 1975 revision of the distributorship agreement, which was at issue in this litigation (and which stated that it was governed by the law of Iowa), had no specified duration. In language somewhat different from that used in the earlier agreements,[4] the 1975 agreement provided in part regarding termination as follows:

3. The District Court found that Corenswet "does have a net loss of something like $75,000.00 in this agreement, plus the possibility of the profits that it had hoped to gain." Appendix B hereto, p. A-39, *infra*. As of the time of trial in late 1976, Amana sales constituted all of Corenswet's "white goods" or major household appliance business, and 26 percent of all of Corenswet's business. No other "white goods" line was available to Corenswet.

4. The earlier versions of the distributorship agreement between these parties had provided: "THIS AGREEMENT MAY BE TERMINATED BY EITHER OF THE PARTIES AT ANY TIME, WITH OR WITHOUT CAUSE, upon giving ten (10) days' notice of same by registered mail or telegram to the other party. The ten (10) day period shall commence as of the date of mailing the letter or sending the telegram. Either party may terminate immediately upon breach of the Agreement by the other party." [Bold face emphasis added.]

> "THIS AGREEMENT MAY BE TERMINATED BY EITHER PARTY AT ANY TIME FOR ANY REASON upon giving ten (10) days notice of same by registered mail or telegram to the other party, which termination shall be effective ten (10) days from the receipt of said notice. Notwithstanding the foregoing, Amana may terminate this agreement by written notice to the Distributor effective immediately in the event the Distributor fails to comply with any of the provisions of this Agreement; or if Distributor shall become insolvent or bankrupt or admit in writing its inability to pay debts as they become due; or Distributor makes an assignment for the benefit of creditors, whether voluntary or involuntary, or if a petition is filed by or against Distributor under the Bankruptcy act; or if Distributor ceases to do business as a going concern."
> [Bold face emphasis added.]

Amana's president later testified at trial that Amana considered it necessary to have a "good reason" to terminate this agreement, and that Amana did not arbitrarily cancel any distributor. 1538 App. 674-76.

In mid-1976, Amana's president orally informed Corenswet that Amana would soon terminate the distributorship because Corenswet was underfinanced. This announcement was followed by a series of increasingly tough demands that Corenswet obtain more security for its credit; each of these demands was adequately met, however. See Appendix A hereto, pp. A-31 to A-34, *infra*. Finally, unable to push Corenswet into a financially questionable status, Amana gave written notice of termination. Under date of September 14, 1976, Amana wrote Corenswet "to reconfirm the notice of

termination of your franchise agreement with Amana," as previously discussed. The letter stated Amana had no other choice than to terminate, "since your company was unable to provide us with what we felt to be the minimum guarantees and/or security to sustain a continuing pattern of growth with Amana." 1538 App. 75. This lawsuit was filed shortly after the receipt of this letter, Corenswet claiming that such an arbitrary termination constituted a breach of the agreement.

Following a three-day evidentiary trial in the District Court, Judge Rubin on November 30, 1976 determined that the termination of the agreement should be preliminarily enjoined. In so ruling, Judge (now Circuit Judge) Rubin found that the reason given by Amana in the letter for terminating was a sham and a fraud, a fact which had been conceded at the trial by Amana's senior vice president and chief financial officer. 1538 App. 653-659. Corenswet had simply given Amana no financial excuse for cancallation. In Judge Rubin's words, the "preponderance of the evidence" indicated "that what was done was not in good faith for the reason advanced [in the letter], fiscal irresponsibility, but was done solely to terminate a franchise for reasons I do not know why." See Appendix B hereto, p. A-32, *infra*. The Fifth Circuit found ample evidence in the record to support Judge Rubin's conclusion that the termination was arbitrary and capricious.

The District Court's entry of the preliminary injunction against termination was premised on its treatment of the contract clause that purported to allow either party to terminate at any time "for any reason." The District Court concluded, on two alternative grounds, that Amana could not terminate this agreement arbitrarily or in bad faith.

(1) The use of the words "for any reason" implies that there be some "reason" for termination, some "reason" that "appeals to the reason, to the mind, to the judgment, not for something that is arbitrary, capricious, wanton." See Appendix B hereto, p. A- 31 *infra*.

(2) The "good faith" principle embodied in § 1-203 of the Uniform Commercial Code, as adopted by Iowa, requires good faith in the termination of the distributorship agreement; and since Amana's termination actions were found to have been in bad faith, the Code forbids the termination. See Appendix B hereto, pp. 35, 51 *infra*.[5]

The Fifth Circuit reversed as to both bases of the District Court's ruling. First, it held that the District Court's construction of the "for any reason" language in the agreement was clearly erroneous; the correct construction of the phrase "for any reason" was held to be: "for any reason that the actor [Amana] deems sufficient." See Appendix A hereto, p. A-14, *infra*. Second, the Fifth Circuit held that, "under the better view, the [Uniform Commercial] Code does not *ipso facto* bar unilateral arbitrary terminations of distributorship agreements, and that Iowa's adoption of the Code therefore left undisturbed the law reflected in the *Drewrys* deci-

5. The District Court later modified its injunction in November of 1977 to require Corenswet to execute a new version of the distributorship agreement within five days or suffer termination of the 1975 agreement. Corenswet did so execute the new agreement. But the court also placed restrictions on Amana's right to refuse to renew the new agreement, which had a one-year term. The modified injunction prohibited Amana from refusing to renew the distributorship term "without reason." Amana was also enjoined to accord Corenswet equal treatment with Amana's other distributors.

Amana's separate appeal from these amendments to the original injunction was found meritless by the Fifth Circuit, see Appendix A hereto, pp. A-12, 13, *infra*, and is not involved in this petition for certiorari.

sion [by the Iowa Supreme Court prior to the adoption of the Code]." [6] See Appendix A hereto, p. A-23, *infra*. Additionally, the Fifth Circuit read the language of §2-309(2) of the Code, which provides that contracts of indefinite duration "may be terminated at any time by either party", as constituting an implied exception to the Code's good faith obligation. In this manner the Fifth Circuit gave unprecedented judicial sanction to arbitrary and bad faith terminations of franchise agreements having no definite terminal date.

The Fifth Circuit thus rejected the District Court's studied efforts to foreclose an arbitrary and bad faith termination of the distributorship agreement through either a reading of the contract language or an interpretation of the good faith obligation codified in §1-203 of the Uniform Commercial Code.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit has rendered a decision that will have a dramatic and deleterious impact on the national franchising phenomenon, as well as on its surrounding legal structure. In effect, the Fifth Circuit has given a green light to the nation's franchisors to use their superior economic position to reserve unto themselves a contractual right to terminate franchise and distributorship agreements of indefinite duration for any reason that strikes their fancy. The notion of good faith with respect to terminating such agreements has been excised from the Uniform Commercial Code, as now codified in the laws of all 50 states, the District of Columbia and the Virgin Islands. There are several compelling reasons why such a decision should be reviewed by this Court.

6. *Des Moines Blue Ribbon Distributors, Inc. v. Drewrys Limited, U.S.A., Inc.*, 256 Iowa 899, 129 N.W. 2d 731 (1964).

1. The problem of arbitrary termination of franchise agreements is one of national significance.

The problem epitomized by Amana's concededly arbitrary cancellation of its distributorship agreement with Corenswet is more than a parochial one as between these two parties. It is a national problem, an interstate problem. It is a growing problem that besets the burgeoning franchise mode of business throughout the United States.

Over the past three decades, franchising has become one of the dominant means of commercial trading in the United States. Franchising today affects manifold types of consumer products and services. Department of Commerce figures show that in 1976 the nation's 446,000 franchised businesses generated more than $212 billion in retail sales and employed over 3.5 million persons.[7]

But there are major legal problems associated with franchising. Just last term, in *New Motor Vehicle Board of Cal. v. Orrin W. Fox Co.*, 439 U.S. 96 (1978), this Court recognized the basic source of these problems, the "disparity in bargaining power" that permits the franchisor to dictate the terms of the relationship with the franchisee. See also *F.T.C. v. Texaco Inc.*, 393 U.S. 223, 228-229 (1968), referring to the franchisor's "dominant economic power" over franchised dealers. In most instances, as in this case, the agreement between the parties is not a truly bargained contract but is "unilaterally drafted by the franchisor and offered to the franchisee on a take-it-or-leave-it basis". Brown and Cohen, *Franchise Equities*, 63 Mass. L.Rev. 109, 111 (1978).

7. U.S. Bureau of Domestic Commerce, *Franchising in the Economy, 1975-77*, summarized in *Statistical Abstract of the United States* 837 (1977). This report also estimated that gross sales by franchised establishments would exceed $238 billion in 1977, out of total retail sales of $650 billion. See also S.Rep. No. 91-1344, 91st Cong., 2d Sess., at 7 (1970).

This disparity in bargaining power dominates the national franchising scene. Franchisors persist in using their superior economic strength to insert into franchise agreements a full panoply of one-sided terms and conditions. Prominent among those terms is the arbitrary power often reserved unto the franchisor to terminate or not renew the agreement "at any time for any reason" – the language used in the Amana agreement in this case. Franchisors hope that the courts will do just what the Fifth Circuit has here done, *i.e.*, read that language to permit termination for the most arbitrary, capricious, dishonest and distasteful of reasons, without regard to the bargaining inequality out of which the "agreement" springs.[8]

Federal and state authorities have responded in a variety of ways to the arbitrary use of the franchisor's reserved power of termination. The prime weapons to date have been the arsenal of state statutory and common law principles. But the obvious interstate nature of the franchising phenomenon has

8. "Arbitrary, unreasonable termination of franchise agreements is perhaps the most threatening of all abuses . . . for it is upon termination that the franchisee suffers the most. The roots of this problem are embedded in the economic disparity in the bargaining positions of the parties, and in most instances termination spells financial disaster for the franchisee. His investment of thousands of dollars and long hours of hard work may have little value when divorced from the franchise, and unreasonable termination could well mean that his first investment is also his last." Caine, *Termination of Franchise Agreements: Some Remedies For Franchisees Under The Uniform Commercial Code*, 3 Cumberland-Samford L. Rev. 347, 349 (1972).

See the Court's statement in *Northern Ohio Traction & Light Co. v. State of Ohio*, 245 U.S. 574 (1918) at 585:

> "It would be against common experience to conclude that rational men wittingly invested large sums of money in building a railroad subject to destruction at any moment by mere resolution of county commissioners."

See a similar statement in *Detroit v. Detroit Citizens' Street Ry. Co.*, 184 U.S. 368, 384 (1902).

spawned repeated efforts to enact a federal law outlawing arbitrary terminations of all kinds of franchise agreements.[9] While those efforts have yet to succeed, there are a number of statutes in the federal arena that address this franchise problem in specialized situations. For example, the Automobile Dealer's Day in Court Act, 15 U.S.C. §§ 1221-1225, and the more recent Petroleum Marketing Practices Act., 15 U.S.C. §§ 2801-2806,[10] seek to preclude arbitrary terminations of specified kinds of franchise agreements by spelling out "good faith" grounds that alone can justify termination. Arbitrary terminations can also constitute or lead to violations of the federal antitrust laws and the Federal Trade Commission Act. See, *e.g.*, *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964); *Atlantic Refining Co. v. F.T.C.*, 381 U.S. 357 (1965).

The main burden of combatting the evil of arbitrary termination has fallen upon state law. Some 14 states have enacted general franchising statutes that proscribe arbitrary and bad faith terminations in all areas of franchising,[11] while 34

9. In the 95th Congress alone, more than a dozen bills were introduced to prevent termination or nonrenewal of franchises except for good cause. The most notable of these bills was H.R. 5016, sponsored by Rep. Abner Mikva, as to which 10 days of hearings were held before the House Commerce Subcommittee on Consumer Protection and Finance in June and November of 1977.

10. Among the factors leading to the enactment of the Petroleum Marketing Practices Act were "numerous complaints by [petroleum] franchisees of unfair terminations or non-renewals of their franchises for arbitrary and even discriminatory reasons." S.Rep., No. 95-731, 95th Cong., 2d Sess., at 17 (1978), reprinted in [1978] U.S.Code Cong. & Admin. News 873 at 875-876.

11. See Fine, *Terminations of Franchiees, Dealers and Distributors, in Representing the Franchisor and Franchisee* 171 at 192 (P.L.I. Course Handbook Series, 1979), which lists the following 14 states as having statutes governing termination and/or nonrenewal of franchises in general: Arkansas, Connecticut, Delaware, Hawaii, Indiana, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, Virginia, Washington and Wisconsin.

states have their own versions of the federal Automobile Dealer's Day in Court Act and 19 states have statutes outlawing arbitrary terminations of alcoholic beverage franchises.[12] And in footnote 7 of this Court's opinion in the *New Motor Vehicle Board* case, *supra*, citation was made to the statutes of 18 states that establish the good faith conditions under which an automobile franchisor may locate or relocate an automobile dealership.

The weaponry of state law for use in the battle against arbitrary termination includes the common law principles of tort, contract and property. But increasing use is being had of the Uniform Commercial Code, which is proving to be "a significant source of relief from arbitrary termination of franchise contracts." Caine, *Termination of Franchise Agreements: Some Remedies for Franchisees under the Uniform Commercial Code*, 3 Cumberland-Samford L. Rev. 347, 379 (1972). While the Code was not adopted by the states with franchising particularly in mind, it has been said that "if real court supervision of the franchise relationship under the Code comes, it will arise out of the good faith requirement" Hewitt, *Termination of Dealer Franchises and the Code - Mixing Classified and Coordinated Uncertainty with Conflict*, 22 Bus. Law. 1075, 1086 (1967).

Several critical conclusions derive from this survey of the nationwide termination problem:

(1) Both federal and state authorities have reached a consensus that arbitrary and bad faith terminations are avoidable evils.

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12. Ibid., note 11, *supra*. See also the Puerto Rican Dealer's Contract Law, which provides: "Notwithstanding the existence in a dealer's contract of a clause reserving to the parties the unilateral right to terminate the existing relationship, no principal or grantor may directly or indirectly . . . refuse to renew said contract on its normal expiration except for just cause." P.R. Laws Ann. tit. 10, §278a (Supp. 1968).

(2) Both federal and state legal structures are utilizing the concept of good faith to combat these evils. The good faith obligations of the Uniform Commercial Code, which are effective in all the states, are integral parts of this federal-state assault on arbitrary terminations.

(3) Hence the Fifth Circuit's ruling in this case, rejecting the use of the Code's good faith obligations, has a significance of vast national proportions. That ruling can have a critical and incalculable impact upon other courts confronted with the identical termination problems, whether arising under the Uniform Commercial Code or some other state or federal statute.

(4) With particular respect to the good faith obligations set forth in the Uniform Commercial Code, the Fifth Circuit's decision will have an important and far-reaching impact in the 52 state and federal jurisdictions that have codified the good faith obligations of the Code. The Fifth Circuit has created a novel exception to those obligations, an exception that can be exploited by all franchisors seeking judicial approval of arbitrary terminations of contracts of unlimited duration.

In short, the universality of the good faith concept with respect to franchise terminations justifies review of the adverse precedent created here by the Fifth Circuit.

2. The Fifth Circuit's unprecedented action in reading an implied exception into the good faith obligation of the Uniform Commercial Code creates additional problems warranting review.

This is an unusual diversity case. The very fact that the federal courts below, in execution of their *Erie* function, were obliged to apply nationwide standards reflected in Iowa's codification of the Uniform Commercial Code evokes

additional reasons for review.

As a general certiorari proposition, "save in exceptional cases", this Court is not prone to review "the considered determination of questions of state law by the intermediate federal appellate courts". *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944).[13] This is one of those "exceptional cases" warranting plenary review by this Court, as witness the following considerations:

(1) The so-called local law of Iowa was here invoked in a diversity case not to resolve any legal problem peculiar to Iowa jurisprudence but to resolve one manifestation of a nationwide problem respecting franchise terminations.

(2) As if to emphasize the universality of the termination problem, the Fifth Circuit applied certain Iowa statutory concepts that mirror nationally uniform legal standards. The court, in other words, assessed the contract language and Amana's termination actions in light of the provisions of the Uniform Commercial Code, as codified in Iowa, dealing with the good faith obligation (I.C.A, §§ 554.1102(3), 554.1203) and the termination of contracts of unlimited duration (I.C.A. §554.2309(2)). And the conclusion was drawn that the termination provisions of Code § 2-309(2) are to be given "precedence" over the Code's pervasive good faith obligation.

The good faith obligation that was given such a restricted reading is in effect not only in Iowa but in all the other 49

13. This general proposition is based in part upon the expertise as to the relevant state law that can be ascribed to the federal appellate court in whose circuit the particular state is located. *Estate of Spiegel v. Commissioner*, 335 U.S. 701, 707-708 (1949). That reason is not here applicable, for the Fifth Circuit cannot be assumed to be particularly knowledgeable as to the law of Iowa.

states, the District of Columbia and the Virgin Islands.[14] Thus all 52 jurisdictions uniformly impose the Code's "obligation of good faith" in the performance and enforcement of contracts (§ 1-203), an obligation that the Code states "may not be disclaimed by agreement" of the parties (§ 1-102(3)). That good faith concept of the Code, of course, finds exact counterparts in various federal and state statutes that proscribe arbitrary terminations of specified types of franchise agreements.

(3) A major premise of the Uniform Commercial Code (§ 1-202(2) (c)), effective in all jurisdictions, is the desire that the universally applicable provisions be interpreted and applied so as "to make uniform the law among the various jurisdictions". Thus the Fifth Circuit was duty bound, in the absence of any statutory or judicial variation in Iowa, to interpret and apply the Code's good faith obligation so as not to "miss the desired [national] uniformity" and so as not to "erect upon the foundation of uniform language separate legal structures as distinct as were the former [pre-Code] varying laws." *Commercial National Bank v. Canal-Louisiana Bank & Trust Co.*, 239 U.S. 520, 528 (1916).[15]

14. Congress enacted the Uniform Commercial code for the District of Columbia. See 77 Stat. 630; 28 D.C. Code § 1-101, *et seq.*

While Louisiana is alone in not having adopted the Uniform Commercial Code as such, it has adopted in substance Articles 1, 3, 4, 5, 7 and 8 of the Code. Thus it has enacted the good faith obligation contained in Article 1. See Title 10, Commercial Laws, La. Rev. Stats. §§1-102(3), 1-203.

15. In the *Commercial National Bank* case, this Court held that a federal court was obligated, in the course of bankruptcy proceedings, to interpret and apply in a uniform fashion certain provisions of the Uniform Warehouse Receipts Act (now incorporated in the Uniform Commercial Code), as then in effect in Louisiana. That Act, like the Code, was designed to make uniform the law of all the states enacting the provisions of the Act.

(4) The *Commercial National Bank* decision further makes clear that when a federal court is called upon to interpret and apply a uniform state statute designed to achieve national uniformity in the law, the federal court must take into consideration "the fundamental purpose of the Uniform Act and that it [the state stature] should not be regarded merely as an offshoot of local law." 239 U.S. at 528-529. That ruling expresses the core reason why the instant case is not an ordinary diversity case involving the application of local law. It is an extraordinary diversity case wherein the federal court is *Erie*-bound to interpret and apply nationally uniform provisions of law in resolving a legal dispute of nationwide significance. And the Fifth Circuit appears to have created an exception to the Code's good faith obligation that is unprecedented and hence contrary to the Code's requirement of national uniformity.

Thus the decision below is reviewable not only because of the importance of the termination issue but because of the importance of maintaining federal court adherence to the uniform good faith obligation that the Uniform Commercial Code attaches to all contracts and agreements subject thereto. If there is to be a major exception written into that Code obligation, it should be written by state courts or state legislatures, not by federal diversity courts. A federal court is not authorized by *Erie* to legislate any change in the Uniform Commercial Code.

Moreover, if a federal court is allowed to change the Uniform Commercial Code in such a way as to close the doors of state courts to untold numbers of aggrieved franchisees, those franchisees will be encouraged, if not compelled, to transfer to the federal courts their legal battle for survival. Their only hope would then be to create or imply some federal cause of action from the assorted federal statutes that variously implicate the franchising business. It can also

be anticipated that a multitude of frivolous antitrust suits will clog the federal court dockets as terminated franchisees grope for some means of survival.

Such a forced distortion of the existing federal-state court dichotomy respecting franchise terminations should not be tolerated. Cf. *Santa Fe Industries v. Green*, 430 U.S. 462, 478 (1977); *Piper v. Chris-Craft Industries*, 430 U.S. 1, 40-41 (1977). If at all possible, federal courts should hesitate long before precluding resolution of a national franchising problem by means of state court enforcement of the good faith obligation of the Uniform Commercial Code. State courts should be left with maximum freedom to develop the good faith concept embedded in the Code, a concept that has not always been easy to fathom or apply. See Summers, *"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 Va. L. Rev. 195 (1968); Hillman, *Policing Contract Modifications under the UCC: Good Faith and the Doctrine of Economic Duress*, 64 Iowa L. Rev. 849, 876-880 (1979). Since Iowa has not expressed any desire or intent to withdraw the good faith obligation of the Code from terminations of contracts of indefinite duration, it does not lie within the power of the federal courts to execute such a withdrawal.

3. The Fifth Circuit's decision reaches a result inconsistent with the good faith obligation imposed by the Uniform Commercial Code.

In essence, the Fifth Circuit has held that the good faith obligation set forth in the Uniform Commercial Code does not foreclose a franchisor from reserving a unilateral contract right to terminate – arbitrarily and in bad faith – a franchise agreement of indefinite duration. Such a result is both unrealistic and inconsistent with the spirit and language of the

Code ,

(1) All jurisdictions in the United States unite in requiring that the Code's obligation of good faith be superimposed on the performance and enforcement of any and all agreements, an obligation that cannot be disclaimed by the parties in any provision of their agreement. It would seem clear that Amana could exercise its unilateral power to terminate the instant distributorship agreement "at any time for any reason" only to the extent that such exercise is consistent with the good faith obligation. Yet the Fifth Circuit has interpreted the words "at any time for any reason" as if they were unaffected and unconditioned by the overriding good faith obligation of the Code. Those words are described by the Fifth Circuit as "express terms" that by themselves fully justify a termination even "without a good reason".

(2) The Fifth Circuit further found that the Code's good faith obligation does not override or even affect the provision in Code § 2-309(2) that a contract of indefinite duration "may be terminated at any time by either party". Such a ruling constitutes a major restriction on an obligation that has always been deemed to pervade all other provisions of the Code. There is no precedent in Iowa or any other jurisdiction for so retracting the Code's good faith obligation.

The Fifth Circuit attempted to find judicial precedent for its novel interpretation that the termination provisions of Code § 2-309(2) are to be given precedence over the good faith obligation of Code § 1-203. That attempt is misplaced. No court has ever held that the Code's good faith obligation is *ipso facto* overridden by the termination provisions of § 2-309(2).[16]

16. The only two cases cited by the Fifth Circuit as holding that Code § 2-309(2) authorizes termination of contracts of indefinite duration by either party, with or without cause, do not discuss or mention the

On its merits, the exception created by the Fifth Circuit is dubious at best. Why should a franchisor be allowed to terminate an agreement of indefinite duration in an arbitrary and bad faith manner? Indeed, there is no necessary inconsistency between the Code's good faith and termination provisions. Freedom to terminate a contract "at any time" is not destroyed or unduly inhibited by a statutory or moral obligation to perform all acts in good faith. It is just as meaningful to impose a good faith requirement on a termination of an agreement of indefinite duration as on a termination of an agreement with a fixed terminal date. That is the sense of the Seventh Circuit's ruling *Tele-Controls, Inc. v. Ford Industries, Inc.*, 388 F.2d 48, 51 (7th Cir. 1967), a ruling which must be deemed in conflict with that of the Fifth Circuit in his case.

(3) The Fifth Circuit's treatment of this distributorship agreement as a fairly bargained contract, in which the parties had a meeting of minds on each of the "express terms", is belied by the economic realities of the national franchising business. The agreement was drafted and printed by the franchisor long before the franchisee ever saw it; and the franchisee had no opportunity to bargain or to consider any of the "express terms" that the Fifth Circuit assumed were binding on the franchisee. Such an instrument would appear to be a classic candidate for invocation of the Code's good faith obligation.

(4) The Fifth Circuit acknowledged the absence of any Iowa cases under the Code relevant to the arbitrary termi-

(Footnote 16 - continued)

Code's good faith obligation. See *Rockwell Engineering Co.; Inc. v. Automatic Timing & Controls Co.*, 559 F.2d 460 (7th Cir. 1977), and *Aaron E. Levine & Co. v. Calkraft Paper Co.*, 429 F.Supp. 1039 (E.D, Mich. 1976).

nation issue. It relied instead upon the pre-Code Iowa decision in the *Drewrys* case,[17] a decision that was said to hold that reasonable notice is the only restriction on a manufacturer's right to cancel a distributorship agreement. The Fifth Circuit added the comment that, under the *Erie* doctrine, it should hesitate to depart from such pre-Code "established case authority" as the *Drewrys* case without "fair assurance" that Iowa would somehow interpret its uniform Commercial Code to forbid bad faith or arbitrary terminations.[18]

Such reliance on pre-Code case authority for interpreting a uniform state code provision was expressly rejected long ago by this Court in the *Commercial National Bank* case, 239 U.S. at 529. In holding that a federal court could not interpret Louisiana's Uniform Warehouse Receipts Act in light of earlier Louisiana decisions, the Court ruled that "the principle of the Uniform Act should have recognition to the exclusion of any inconsistent doctrine which may have previously obtained in any of the States enacting it." The same principle of interpretation should be applied to the Uniform Commercial Code.

(5) Other jurisdictions that have recently dealt with the termination problem under the Code or otherwise have been virtually unanimous in holding that arbitrary terminations are prohibited by the requirements of good faith and/or con-

17. *Des Moines Blue Ribbon Distributors, Inc. v. Drewrys Limited, U.S.A., Inc.*, 256 Iowa 899, 129 N.W. 2d 731 (1964).

18. But the Fifth Circuit made no mention of an Iowa decision rendered after Iowa's adoption of the Uniform Commercial Code. *C. & J. Fertilizer, Inc. v. Allied Mutual Ins. Co.*, 227 N.W. 2d 169 (Iowa, 1975). The Iowa Supreme Court there held that the reasonable expectations of the parties must take precedence over the terms of a standard printed contract.

scionability. See *Randolph v. New England Mutual Life Ins. Co.*, 526 F.2d 1383 (6th Cir. 1975); *deTreville v. Outboard Marine Corp.*, 439 F.2d 1099 (4th Cir. 1971); *Tele-Controls, Inc. v. Ford Industries, Inc.*, 388 F.2d 48 (7th Cir. 1967); *Atlantic Richfield Co. v. Razumic*, 480 Pa. 366, 390 A.2d 736 (1978); *Baker v. Ratzlaff*, 1 Kan. App. 2d 285, 564 P. 2d 153 (1976); *Ashland Oil, Inc. v. Donahue*, 223 S.E. 2d 433 (W. Va. 1976); *Shell Oil Co. v. Marinello*, 63 N.J. 402, 307 A.2d 598 (1973); *John W. Lodge Dist. Co., Inc. v. Texaco Inc.*, 245 S.E. 2d 157 (W. Va. 1978). The decision of the Fifth Circuit approving arbitrary terminations under the Code is contrary to all these appellate decisions.[19]

19. Most commentators urge use of the Code's good faith and/or conscionability provisions to protect distributors against arbitrary terminations. See, *e.g.*, Hewitt, *Good Faith or Unconscionability - Franchise Remedies for Termination*, 29 Bus. Law. 227 (1973); Gellhorn, *Limitations on Contract Termination Rights - Franchise Cancellations*, 1967 Duke L.J. 465; Caine, *Termination of Franchise Agreements: Some Remedies for Franchisees Under the Uniform Commercial Code*, 3 Cumberland-Samford L. Rev. 347 (1972).

CONCLUSION

For these various reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of Fifth Circuit Court of Appeals

CORENSWET, INC., Plaintiff-Appellee,
v.
AMANA REFRIGERATION, INC.,
Defendant-Appellant.

Nos. 77-1538 and 77-3474.

United States Court of Appeals,
Fifth Circuit

April 30, 1979.

An exclusive, wholesale distributor in southern Louisiana of certain home products manufactured by defendant brought suit to prevent defendant from terminating the business relationship. The United States District Court for the Eastern District of Louisiana, at New Orleans, Alvin B. Rubin,J., rendered judgment in favor of plaintiff, and defendant appealed. The Court of Appeals, Wisdom, Circuit Judge, held that: (1) the district court's construction of exclusive distributorship's termination clause, which allowed termination by either party "at any time for any reason" on ten days' notice, to prohibit unilateral termination of a distributorship except for some "reason" that appeals to the mind was improper, as the contractual language, in the common understanding, meant for any reason deemed sufficient by the actor; moreover, even assuming defendant needed "some reason" to terminate, that reason was supplied by its evident desire to give the distributorship to another company, and (2) unlike the Uniform Commercial Code's unconscionability provision, the Code's general

obligation of good faith dealing cannot properly be used to override or strike express contract terms.

Decisions reversed; preliminary injunction vacated.

1. Federal Courts 811

In general, an appeals court's deference to the trial court's discretion is at its height when litigants challenge that court's administration of its own decree in equity.

2. Contracts 217

District court's construction of exclusive distributorship's termination clause, which allowed termination by either party "at any time for any reason" on ten days' notice, to prohibit unilateral termination of a distributorship except for some "reason" that appeals to the mind was improper, as the contractual language, in the common understanding, meant for any reason deemed sufficient by the actor; moreover, even assuming defendant manufacturer needed "some reason" to terminate, that reason was supplied by its evident desire to give the distributorship to another company.

3. Federal Courts 792

Because the district court looked to extrinsic evidence in construing the contract in question, its interpretation was, under Iowa law, to be treated as a factual one; accordingly, appellant had the burden of persuading the Court of Appeals that the district court's interpretation was clearly erroneous. Fed.Rules Civ.Proc. rule 52(a), 28 U.S.C.A.

4. Customs and Usages 15(1), 16, 17

A course of commercial conduct may not only supplement or qualify express contract terms, but in appropriate circumstances may even override express terms. I.C.A. §§554.1205, 554.2208(2); U.C.C. §§ 1-205, 2-208(2).

5. Contracts 256

Except in cases of conduct of the sort giving rise to promissory estoppel, no justification exists for holding that a contractually reserved power, however, distasteful, may be lost through nonuse.

6. Contracts 170(1)

Since an express contract term could not be construed as plaintiff would construe it, it therefore controlled over any allegedly conflicting usage or course of dealing. I.C.A. §§554.1205, 554.2208(2); U.C.C. §§1-205, 2-208(2).

7. Contracts 168

Unlike the Uniform Commercial Code's unconscionability provision, the Code's general obligation of good faith dealing cannot properly be used to override or strike express contract terms. U.C.C. §§ 1-102(3), 1-203, 2-302; I.C.A. §§ 544.1102 (3), 554.1203, 554.2302.

8. Contracts 217

When a contract contains a provision expressly sanctioning termination without cause, there is no room for implying a term that bars such a termination; in the face of such a term, there can be, at best, an expectation that a party will decline

to exercise his rights. U.C.C. §§ 1-102(3), 1-203; I.C.A. §§554.1102(3), 554.1203.

9. Contracts 217

As a tool for policing distributorship terminations, the Uniform Commercial Code's "good faith" test is erratic at best; the better approach is to test the disputed contract clause for "unconscionability" under the Code. U.C.C. §§1-102(3), 1-203, 2-302; I.C.A. §§ 554.1102(3), 554.1203, 554.-2302.

10. Contracts 108(1)

Public policy does not frown on contract clauses permitting termination without cause.

11. Contracts 1

It is the office of the Uniform Commercial Code's unconscionability concept, not the good faith concept, to strike down "unfair" contract terms. U.C.C. §§ 1-102(3), 1-203, 2-302; I.C.A. §§554.1102(3), 554.1203, 554.2302.

12. Contracts 217

Uniform Commercial Code does not ipso facto bar unilateral arbitrary terminations of distributorship agreements, and Iowa's adoption of the Code therefore left undisturbed the law reflected in the *Drewrys* decision. U.S.C.§§1-102(3), 1-203, 2-302; I.C.A. §§ 554.1102(3), 554.1203, 554.2302.

Charles M. Lanier, New Orleans, La., John R. Carpenter, Stephen J. Holtman, Cedar Rapids, Iowa, for defendant-appellant in both cases.

Robert E. Barkley, Jr., New Orleans, La., Bernard D. Craig, Jr., Michael B. Shteamer, Kansas City, Mo., for plaintiff-appellee in both cases.

Ruthledge C. Clement, Jr., New Orleans, La., for defendant-appellant in 77-3474.

Sessions, Fishman, Rosenson, Snellings & Boisfontaine, New Orleans, La., Levy & Craig, Kansas City, Mo., for plaintiff-appellee in 77-3474.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before WISDOM, AINSWORTH, and CLARK, Circuit Judges.

WISDOM, Circuit Judge:

Consolidated appeals in this diversity litigation[1] arise from the termination of a distributorship. Corenswet, Inc.[2], headquartered in New Orleans, has been an authorized, exclusive distributor of certain home appliances manufactured by Amana Refrigeration, Inc. ("Amana"). Corenswet sued to prevent Amana from terminating the relationship, on the ground that Amana's attempted termination was arbitrary and capricious. The district court found that the termina-

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1. Under the contract and by stipulation of the parties the substantive law of Iowa controls.

2. In 1972 Select Brands Industries, Inc., a Missouri corporation, acquired Corenswet. Sam Corenswet remained as president and chief executive officer.

tion was arbitrary and was therefore in breach of the distributorship agreement as well as of the Uniform Commercial Code's general "good faith" principle. Amana challenges the district court's finding that the termination was arbitrary and without cause. We hold that the finding is not clearly erroneous. That is far from settling the dispute. The court issued a preliminary injunction forbidding the termination. No. 77-1538 is Amana's appeal from the ruling.

While that appeal was pending, Amana drew up a new standard form distributorship agreement, which limited the term of distributorships to one year. Corenswet, alone among Amana's distributors, refused to execute the new agreement, which it viewed as an attempt to circumvent the injunction. Amana responded with the contention that Corenswet's refusal to sign constituted just cause for terminating the distributorship. The district court agreed with Amana that Corenswet's refusal to sign the new contract would constitute cause for termination, but ruled that if Corenswet signed Amana could not refuse to renew the agreement at the end of any one-year term without good reason. Amana's appeal from that ruling is No. 77-3474.

The basic question at the heart of these appeals is whether Amana was entitled to terminate the distributorship arbitrarily. Amana assails the district court's interpretation of the contract to forbid an arbitrary termination, as well as the court's alternative rationale that the attempted termination is barred by the Iowa U.C.C.'s "good faith" principle. We hold that an arbitrary termination is permissible under both the contract and the law of Iowa. We reverse the district court's judgments.

I.

The primary facts are not disputed.

The plaintiff, Corenswet, Inc., is an independent wholesale distributor of appliances, dishware, and similar products. Since 1969 Corenswet has been the exclusive distributor of Amana refrigerators, freezers, room air conditioners, and other merchandise in southern Louisiana. Amana is a Delaware corporation domiciled in Iowa. Under the Amana system, products manufactured by Amana are sold to wholesale distributors such as Corenswet and to Amana's factory wholesale branches. The independent distributors and the factory branches then resell the merchandise to retail dealers who, in turn, sell to the public. The first distributorship agreement executed between Amana and Corenswet was of indefinite duration, but terminable by either party at any time "with or without cause" on ten days' notice to the other party. According to the record, the agreement was modified twice, in 1971 and again in July 1975, before the institution of this lawsuit. The 1975 agreement modified the termination provision to allow termination by either party "at any time for any reason" on ten days' notice.

As is so often the case with franchise and distributorship relationships, the termination clause in the standard form contract was of little interest or concern to the parties so long as things were going well between them. At the hearing before the district court, Corenswet introduced testimony that it understood, in the early 1970's, that the relationship would be a lasting one, a relationship that would continue so long as Corenswet performed satisfactorily. According to Corenswet, it developed an organization for wholesale distribution of Amana merchandise: it hired a manager and salesmen for the line, as well as specially trained

repairmen. Corenswet also expanded its physical plant. In all, Corenswet contended, it invested over $1.5 million over the period of 1969 to 1976 in developing the market for Amana products in the southern Louisiana area. The parties stipulated in district court that the annual sales of Amana products in the distributorship area increased from $200,000 in 1969 to over $2.5 million in 1976. The number of retail outlets selling Amana products in the area increased from six in 1969 to seventy-two in 1976. Corenswet, in short, developed an important new market for Amana products. And Amana became as important to Corenswet as Corenswet became to Amana: sales of Amana products as a percentage of Corenswet's total sales of all products swelled from six percent in 1969 to nearly twenty-six percent in 1976. Over the seven and one-half-year period, Amana representatives repeatedly praised Corenswet for its performance.

At the 1976 mid-year meeting of Amana distributors, however, George Foerstner, Amana's president, informed Corenswet that Amana would soon terminate its relationship with Corenswet because Corenswet was underfinanced. The parties agree that in early 1976 Corenswet had exceeded its credit line with Amana, and that Amana at that time indicated that it might have to take a security interest in Corenswet's Amana inventory. According to a January communication from Amana, however, the "problem" was viewed by Amana as "a good kind of problem", reflecting, as it did, the growth of Corenswet's sales and hence purchases of Amana products. It is Corenswet's contention that the problem was not a serious one. Amana executives, the record reflects, assured Corenswet at the 1976 mid-year meeting that "satisfactory arrangements would be made" and that, Foerstner's statement notwithstanding, Corenswet would retain its distributorship.

There followed a complicated sequence of negotiations concerning Amana's security for credit extended. Amana sought a security interest in Corenswet's Amana inventory, to which Corenswet agreed. Amana asked also that Corenswet obtain more working capital from its parent corporation,Select Brands, Inc., as well as a bank letter of credit or line of credit. There is ample evidence in the record that Corenswet responded adequately to each Amana request, but that Amana persisted in changing its requirements as quickly as Corenswet could respond to its requests. In September, 1976, Corenswet met in New Orleans with Amana's representative, George Tolbert. Sam Corenswet, the company's president, informed Tolbert that Corenswet was ready and able to meet Amana's latest request: a $500,000 bank letter of credit. Tolbert relayed the information to Foerstner. Within a week Corenswet received a letter, prepared by Tolbert at Foerstner's direction, notifying Corenswet of its decision to terminate the distributorship because Corenswet was "unable to provide us with what we felt to be the minimum guarantees and/or security to sustain a continuing pattern of growth with Amana".

In October 1976 Corenswet filed suit for damages and injunctive relief in state court alleging that Amana had breached the distributorship agreement by terminating it arbitrarily. The reasons given by Amana for the termination, it contended, were pretextual. The state court issued a temporary restraining order barring termination. The TRO was retained in force after Amana removed the case to federal district court.

The district court conducted a three-day hearing on Corenswet's prayer for a preliminary injunction. The court concluded that Amana had indeed acted arbitrarily in decid-

ing to terminate Corenswet. The record reflects that in early 1976, well before the mid-year distributor meeting, Amana began negotiating with another New Orleans concern, George H. Lehleitner & Co., about transferring its area distributorship to Lehleitner. The beginning of Amana's alleged concern over Corenswet's finances corresponded neatly with its Lehleitner negotiations. There was ample evidence in the record, moreover, to support the district court's conclusion that the real factor motivating Foerstner's decision was animosity towards Fred Schoenfeld, the president of Corenswet's parent corporation, Select Brands, Inc. That animosity dated back to 1972, when Schoenfeld's action in protesting to Raytheon Corporation, Amana's parent, aborted Amana's attempt to transfer the distributorship from Corenswet to Corenswet's then Amana sales manager.

The district court ruled that the arbitrary termination was a breach of the distributorship agreement. The court rejected Amana's argument that the termination clause, which permitted either party to terminate the contract "for any reason", permitted termination for any reason - be that reason good, bad, or indifferent. Although unwilling to accept Corenswet's position that the term "for any reason" imported a good or just cause limitation, the court ruled that the term means "for some reason, not for no reason . . . for something that appeals to the reason, to the mind, to the judgment, not for something that is arbitrary, capricious or wanton". In the alternative, the court ruled that U.C.C.'s "good faith" principle, Iowa Code Ann. § 554.2103, forbids the bad faith termination of exclusive distributorships and found Amana's actions to have been in bad faith. The court issued the preliminary injunction prohibiting Amana from terminating or attempting to terminate the relationship in November 1976.

In late 1977, Corenswet filed a declaratory judgment action in response to Amana's request that Corenswet sign the new standard form distributorship agreement. That civil action was transferred by the district judge to his section of the court. In September of 1977, Amana filed a motion requesting the court to modify or vacate the preliminary injunction to permit Amana to terminate the distributorship. Amana urged that Corenswet's refusal to execute the new distributorship agreement was sufficient cause or reason under the existing agreement and the injunction to justify termination of Corenswet's distributorship. The court denied Amana's motion, but amended the injunction to require Corenswet to execute the agreement within five days or suffer termination of the agreement, and to place restriction on Amana's rights to refuse to renew the one-year term of the new agreement. The modification of the injunction, entered in November 1977, forbade Amana to refuse to renew the distributorship term "without reason" and enjoined Amana to accord Corenswet equal treatment with Amana's other distributors.

II.

Amana appeals both the entry and the modification of the preliminary injunction. It contests the district court's interpretation of the contract and its view of applicable Iowa law and urges that even "bad faith" or "arbitrary" terminations are permitted by the contract and applicable law. Amana also argues that Corenswet failed to satisfy another requisite for issuance of a preliminary injunction: a showing that it would suffer irreparable harm in the absence of injunctive relief *pendente lite*. It further contends that the district court abused its discretion in issuing a preliminary injunction that requires specific performance of the contract because the injunction has the effect of requiring

continuous court supervision of the parties' relationship.

In No. 77-3474 Amana urges that the court erred in failing to rule that Corenswet's post-injunction behavior was good cause for terminating the distributorship. Amana also contends that the court abused its discretion in granting Corenswet an extension of time for executing the agreement and by imposing restrictions on Amana's rights under the new agreement in advance of any conduct on its part giving reason to believe that it would arbitrarily refuse to renew the new agreement at the expiration of its one-year term.

[1] With the exception of the point that the injunction has the effect of forcing these antagonistic parties to maintain their relationship indefinitely and requiring the continuous supervision of the district court, [3] we find little merit in the appellant's attacks on the district court's exercise of its discretion in modifying the injunction. If the district court's view of the contract and the law were correct, we would lack any basis for disturbing the court's modification of the injunction. In general, an appeals court's deference to the trial court's discretion is at its height when litigants challenge that court's administration of its own decrees in equity. Following the entry of the original injunction, the district court, faced with what could justifiably be viewed as an attempt by Amana to circumvent the court's command that it not terminate Corenswet without cause, did Amana a good turn, it seems to us, by permitting Amana, subject to a good cause limitation on its non-renewal rights, to put Corenswet,

3. [D]ifficulty of enforcement is, in itself, often a sufficient reason for denying injunctive relief. [citations omitted]. The Court should not be called upon to weld together two business entities which have shown a propensity for disagreement, friction, and even adverse litigation.

Refrigeration Engineering Corp. v. Frick Co., 1974, W.D. Tex., 370 F.Supp. 702, 715.

like all its other distributors, under the new distributorship agreement. Under the court's original ruling Amana had no right to terminate the old contract unilaterally, a contract which was of indefinite duration and terminable, in the district court's view, only for reason. It was no abuse of discretion of the court to accommodate Amana's interest in keeping all of its distributors under a single form of contract in such a way as to preserve Corenswet's rights, as the court viewed them, under the first contract.

Because there was nothing improper in the court's modification of the preliminary injunction (assuming that the injunction was properly issued in the first place) we turn to the issues raised in No. 77-1538.

[2,3] Amana asserts that the district court erred in construing the contract's termination clause to prohibit unilateral termination of the distributorship except for some "reason" that appeals to the mind. The contractual language "for any reason", it argues, was intended to remove all limitations upon the exercise of the termination power. Because the district court looked to extrinsic evidence in construing the contract its interpretation is, under Iowa law, treated as a factual one. *Allen v. Highway Equipt. Co.*, Iowa, 1976, 239 N.W.2d 135, 139. Amana, therefore, has the burden of persuading us that the court's interpretation was clearly erroneous. *E.G., Griffin v. Missouri Pacific R.R. Co.*, 5 Cir. 1969, 413 F.2d 9; *United States for Use and Benefit of Citizens Nat. Bank v. Stringfellow*, 5 Cir. 1969, 414 F.2d 696; Fed.R. Civ. P. 52(a).

In assessing the district court's interpretation of the contract we must look to the appropriate rules of construction found in applicable state law - in this case, as the parties have

stipulated, the law of Iowa. Although most distributorship agreements, like franchise agreements, are more than sales contracts, the courts have not hesitated to apply the Uniform Commercial Code to cases involving such agreements. *E.G., Rockwell Engineering Co. v. Automatic Timing & Controls Co.*, 7 Cir. 1977, 559 F.2d 460; *Aaron E. Levine & Co. v. Calkraft Paper Co.*, 1976, E.D. Mich., 429 F. Supp. 1039; *Baker v. Ratzlaff*, 1976, 1 Kan. App. 2d 285, 564 P.2d 153. We therefore look to the constructional rules of the Code, as adopted by Iowa, chapter 554 of the Iowa Code.

The starting point under the Code is the express terms of the agreement. U.C.C. §§ 1-205, 2-208(2); Iowa Code Ann. §§554.1205, 554.2208(2). Under the contract, Amana was free to terminate the relationship "at any time and for any reason". The district court did not expressly rely on record evidence concerning the parties' understanding or the common understanding of the term "any reason" in concluding that the term means "something that appeals to the reason, to the mind". In the common understanding, it seems to us, the phrase "for any reason" means "for any reason that the actor deems sufficient". The phrase, that is, is ordinarily used not to limit a power, but to free it from implied limitations of "cause". That this is the intendment of the phrase becomes all the more clear when it is read in conjunction with the immediately preceding phrase "at any time". That phrase plainly frees the termination power from limitations as to timing. The exact parallelism of the two phrases reinforces the interpretation of the "any reason" language as negating any limitations whatsoever. In Webster's New International Dictionary (2d Ed.1939) the first definition of reason is "An expression or statement offered as an explanation of a belief or an assertion or as a justification of an act or procedure." The second of nine definitions given for the word is "a ground or a cause; that in the reality which makes

any fact intelligible". Id. We consider that this is the usual sense of the word when used in the phrase "for any reason".[4]

The district court's interpretation is understandable in view of Amana's vacillation about the meaning of the contract term. When pressed by the district court to explain Amana's position, one of Amana's attorneys stated: "I think it's Amana's position that 'For any reason' means some reason." He went on to add, however, that he thought the term meant the same thing as "with or without cause". When the judge then commented that he thought the attorney was taking a contradictory position, the attorney explained that "any reason" would include a bad reason. When the judge observed that in his opinion a fictitious reason would be no reason at all, the attorney agreed. Later, another Amana attorney stated that it was Amana's position that it did not need a "good reason" or a "legitimate reason" for terminating the contract. To the court's query whether he then disagreed that Amana needed "some reason" the attorney replied that he did not.

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4. Indeed, Corenswet uses the word in this sense in its brief when it urges that "the real reason [for the termination] was because Mr. Foerstner wanted it."

Corenswet cites, in support of the district court's construction, the case of *Dubois v. Gentry*, 1945, 182 Tenn. 103, 184 S. W. 2d 369, in which the Tennessee Supreme Court ruled that the term "for any reason" in a termination clause "should be construed to mean 'any good reason or just reason'." Id. 184 S.W. 2d at 371. The court, however, was not making a factual determination. Rather, it was ruling that the law of the state implies a "just reason" limitation. The question that we are addressing at this point in the opinion is a question of fact. If judicial authority is of aid on this point, we note that the Iowa Supreme Court has used the term "for any reason" to mean the same thing as "at will". *Harper v. Cedar Rapids Television Co.*, Inc., Iowa, 1976, 244 N.W. 2d 782, 791 ("The contract being terminable at will, plaintiff could have been discharged for virtually any reason").

We think that these joustings with the bench over semantics, at the conclusion of the hearing and after the evidence had been received, form too slim a reed to support the court's interpretation of the contract term. Amana never conceded that it needed a justification, in the sense of a reason grounded in Corenswet's conduct, for ending the relationship. Even if it is assumed that Amana needed "some reason" to terminate the contract, that reason is supplied by its evident desire to give the New Orleans distributorship to the Lehleitner company, just as we think that Corenswet would, under the contract, be entitled to terminate the relationship by reason, to take an example, of its wish to handle Kelvinator, rather than Amana, products.

There is no evidence in the record that the parties understood the phrase otherwise. There is testimony that Corenswet officials "understood" that the contract would not be terminated arbitrarily. That, however, is evidence not of Corenswet's understanding of the termination clause as written, but of its expectations about Amana's behavior - that is, its belief that Amana would never use the termination language to Corenswet's detriment. Corenswet has made much of certain testimony given by Amana's president, George Foerstner. Foerstner testified that Amana does "not cancel a distributor without a reason, without a good reason". When asked whether Amana then needed a reason to cancel Corenswet, Foerstner replied: "We needed a reason, yes, but we do not cancel distributors without a reason". This, too, we take not to be evidence of an understanding of the written contractual provision at issue, but as evidence of Amana's usual practice or, at best, of Amana's understanding of how it ought to treat its distributors. The questions posed to Foerstner did not direct his attention to the written contract, much less to the disputed clause. The district court, significantly, did not in its opinion advert to

the Foerstner testimony.[5]

[4-6] We take Corenswet to be arguing that the contractual language must be interpreted in light of Amana's historical treatment of Corenswet and its other distributors. Although Amana's past dealing with Corenswet does not fit the Code categories of sources relevant to contract interpretation - usage of trade, course of dealing, and course of performance[6] – we may assume that it is a source sufficiently similar to the Code categories to be relevant in construing the contract. Courses of commercial conduct "may not only supplement or qualify express [contract] terms, but in appropriate circumstances may even override express terms". J. White & R. Summers, *Handbook of the Law under the Uniform Commercial Code* § 3-3 at 84 (1972). The Code commands that express contract terms and "an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other". U.C.C. § 1-205, Iowa Code Ann. §554.1205; *see also* U.C.C. § 2-208(2), Iowa Code Ann. § 554.2208(2). In this case, however, no reasonable construction can reconcile the contract's express terms with the interpretation Corenswet seeks to glean from the conduct of the parties. The conflict could not be more complete: Amana's past conduct, with regard both to Corenswet and to its other distributors, may have created a reasonable expectation that Amana would not terminate a distributor arbitrarily, yet the contract expressly gives Amana the right to do so. We can find no justification, except in cases of conduct of the sort giving rise to

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5. At the hearing Foerstner, as he did throughout the period just prior to the termination, attempted to put a reasonable face on an act that was arbitrary in the sense that it was largely motivated by personal reasons.

6. See U.C.C. § 1-205(2) (defining usage of trade); § 1-205(1) (defining course of dealing), § 2-208(2) (defining course of performance).

promissory estoppel, for holding that a contractually reserved power, however distasteful, may be lost through nonuse. The express contract term cannot be construed as Corenswet would constitute it, and it therefore controls over any allegedly conflicting usage or course of dealing. U.C.C. §§ 1-205, 2-208(2), Iowa Code Ann. §§554.1205, 554.2208(2). [7]

The district court's alternative rationale was that arbitrary termination of a distributorship agreement contravenes the Code's general obligation of good faith dealing. Section 1-203 states: "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement". Iowa Code Ann. § 554.1203. The good faith obligation is one of those obligations that section 1-102 of the Code says "may not be disclaimed by agreement". Iowa Code Ann. § 554.1102(3). As courts and scholars have become increasingly aware of the special problems faced by distributors and franchisees, and of the inadequacy of traditional contract and sales law doctrines to the task of protecting the reasonable expectations of distributors and franchisees, commentators have debated the utitlity of the Code's general good faith obligation as a tool for curbing abuse of the termination power. *See, e.g.*, E. Gellhorn, *Limitations on Contract Termination Rights -- Franchise Cancellations*, 1967 Duke L.J. 465; Hewitt, *Good Faith or Unconscionability - Franchise Remedies for Termination*, 29 Bus.Law 227 (1973).

7. Corenswet's complaint also alleged the existence of an oral agreement or an oral modification of the existing agreement. The district court did not address this point in the preliminary injunction opinion. The injunction cannot be sustained on the ground that Corenswet is likely to prevail on the merits of this claim. The hearing produced little evidence to support this allegation and produced no proof of the validating "writing" evidencing such an agreement that is required by sections 2-201 and 2-209 of the Code for maintaining a claim or defense based on an oral contract or modification.

The courts of late have begun to read a good faith limitation into termination clauses of distributorship contracts that permit termination without cause. *E.g., Randolph v. New England Mutual Life Ins. Co.*, 6 Cir. 1975, 526 F.2d 1383 (Ohio law); *de Treville v. Outboard Marine Corp.*, 4 Cir. 1971, 439 F.2d 1099 (South Carolina law); *Tele-Controls, Inc. v. Ford Industries, Inc.*, 7 Cir. 1967, 388 F.2d 48 (Oregon law); *Baker v. Ratzlaff*, 1976, 1 Kan. App. 2d 285, 564 P.2d 153. Of the cited cases, however, only the *Baker* case relies squarely on the Code. The *Randolph, de Treville*, and *Tele-Controls* cases rested chiefly on state law doctrines that antedated the adoption of the Code.[8]

In similar cases other courts have held that agency or distributorship contracts of indefinite duration are terminable by either party with or without cause. *E.g., Rockwell Engineering Co. v. Automatic Timing & Controls Co.*, 7 Cir. 1977, 559 F.2d 460 (Indiana law); *Aaron E. Levine & Co. v. Calkraft Paper Co.*, 1976, E.D. Mich., 429 F.Supp. 1039 (Michigan law). Those courts have relied on section 2-309(2) of the Code, which states:

> Where the contract provides for successive performances but is indefinite in duration it is valid for a reasonable time but unless otherwise agreed may be terminated at any time by either party.

8. The Pennsylvania Supreme Court has recently held that the Code's good faith provision bars termination without cause of a gasoline dealership even after the dealer service station lease has expired. *Atlantic Richfield Co. v. Razumic*, 1978, 480 Pa. 366, 390 A.2d 736; *Kowatch v. Atlantic Richfield Co.*, 1978, 480 Pa. 388, 390 A.2d 747. The court emphasized, however, that Arco's contract with the dealers contained no provision giving Arco the right to terminate the relationship at will. *Atlantic Richfield Co. v. Razumic*, 390 A.2d at 741.

Iowa Code Ann. § 554.2309(2). The division in the authorities, then, is between those courts that hold that the Code's general good faith obligation overrides the specific rule of section 2-309(2) as applied to distributorship or franchise agreements, and those that give precedence to section 2-309.

The parties have not cited and we have not found Iowa cases on the issue decided under the Uniform Commercial Code. The Iowa case law on this question is pre-Code and follows the common law rule, which is essentially the rule of section 2-309 as applied to distributorship contracts. In *Des Moines Blue Ribbon Distributors, Inc. v. Drewrys Limited, U.S.A., Inc.*, 1964, 256 Iowa 899, 129 N.W.2d 731, the Iowa Supreme Court held that an exclusive distributorship contract of indefinite duration may be terminated without cause only upon reasonable notice. Although the plaintiff in that case did not, so far as appears from the opinion, claim the right not to be terminated without cause, the court's treatment of the issues raised makes it clear that the requirement of reasonable notice was thought by the court to be the only restriction on the manufacturer's right to cancel the agreement. [9]

9. At one point in its opinion the *Drewrys* court seemed to add another limitation: that the agreement must continue in force for a reasonable time. 129 N.W. 2d at 736. This is the so-called "Missouri doctrine", a hardship rule of agency law designed to give an agent a reasonable time in which to recoup his original investment in the agency. *See generally* E. Gellhorn, *supra*, at 479-483. The *Drewrys* court did not face a claim based on insufficient duration, so its "adoption" of the Missouri doctrine is dictum. Even assuming that the doctrine is indeed law in Iowa, it has no application to this case. The reasonable duration envisioned by the doctrine is quite short, *see* E. Gellhorn, *supra*, at 482; *Bushwick-Decatur Motors, Inc. v. Ford Motor Co.*, 2 Cir. 1940, 116 F.2d 675; and the minimum duration requirement may be eliminated contractually. E. Gellhorn, *supra*, at 482, and authorities cited in 482 nn. 62 & 63.

Because the *Drewrys* case preceded Iowa's adoption of the Uniform Commercial Code, *Erie* does not strictly bind us to that decision. The Code added to Iowa commercial law a statutory good faith obligation. The Iowa law reflected in the *Drewrys* decision has been criticized for treating "what are essentially franchise agreements" as "a series of executory contracts enforceable only if performance has commenced". E. Gellhorn, at 469, n. 15. On the other hand, in an area such as this, where considerations of *stare decisis* are of importance, we should hesitate to depart from established case authority absent fair assurance that the state's courts would interpret the Uniform Commercial Code to forbid "bad faith" or "arbitrary" terminations of distributorship contracts. Unlike the federal courts in the *Randolph, de Treville,* and *Tele-Controls* cases, we are not facing the termination issue against the backdrop of existing state law doctrine that forbids arbitrary terminations.

[7,8] We are not persuaded that the adoption of the Code has effected any change in Iowa law with regard to distributorship terminations. We do not agree with Corenswet that the section 1-203 good faith obligation, like the Code's unconscionability provision, can properly be used to override or strike express contract terms. According to Professor Farnsworth, "[T]he chief utility of the concept of good faith performance has always been as a rationale in a process . . . of implying contract terms. . . ." Farnsworth, *Good Faith Performance and Commercial Reasonableness under the Uniform Commercial Code*, 30 U. Chi. L.Rev. 666, 672 (1963). He defines the Code's good faith obligation as "an implied term of the contract requiring cooperation on the part of one party to the contract so that another party will not be deprived of his reasonable expectations". Id. at 666. When a contract contains a provision expressly sanctioning termination without cause there is no room for implying

a term that bars such a termination. In the face of such a term there can be, at best, an expectation that a party will decline to exercise his rights.[10]

[9-11] As a tool for policing distributorship terminations, moreover, the good faith test is erratic at best. It has been observed that the good faith approach

> is analytically unsound because there is no necessary correlation between bad motives and unfair terminations. . .. The terminated dealer seeks relief against the harsh effects of termination which may be unfairly placed on him, not against the manufacturer's ill will.

E. Gellhorn, *supra*, at 521. The better approach, endorsed by Professor Gellhorn, is to test the disputed contract clause for unconscionability under section 2-302 of the Code. The question these cases present is whether public policy forbids enforcement of a contract clause permitting unilateral termination without cause. Since a termination without cause will almost always be characterizable as a "bad faith" termination, focus on the terminating party's state of mind will always result in the invalidation of unrestricted termination clauses. We seriously doubt, however, that public policy frowns on any and all contract clauses permitting termination without cause. Such clauses can have the salu-

10. Furthermore, the proposition that the Code's good faith obligation cannot be disclaimed must be qualified. Section 1-102(3) of the Code, which provides that the obligation of good faith is not disclaimable, goes on to state that "the parties may by agreement determine the standards by which the performance of such obligation is to be measured if such standards are not manifestly unreasonable." It could be argued that even if arbitrary termination of a distributorship under an agreement silent as to grounds for termination would be in "bad faith", section 1-102(3) nevertheless permits the parties to the contract to stipulate that termination "without cause" or "for any reason" is not in bad faith.

tary effect of permitting parties to end a soured relationship without consequent litigation. Indeed when, as here, the power of unilateral termination without cause is granted to both parties, the clause gives the distributor an easy way to cut the knot should he be presented with an opportunity to secure a better distributorship from another manufacturer. What public policy does abhor is economic overreaching - the use of superior bargaining power to secure grossly unfair advantage. That is the precise focus of the Code's unconscionability doctrine; it is not at all the concern of the Code's good faith performance provision. It is the office of the unconscionability concept, and not of the good faith concept, to strike down "unfair" contract terms.[11]

[12] We conclude that, under the better view, the Code does not *ipso facto* bar unilateral arbitrary terminations of distributorship agreements, and that Iowa's adoption of the Code therefore left undisturbed the law reflected in the *Drewrys* decision.

III.

It follows from what we have said that the preliminary injunction was erroneously entered. The evidence brought out at the hearing in the district court did not demonstrate that Corenswet was likely to succeed on the merits of its claim. The contract expressly permitted Amana to terminate Corenswet's distributorship without cause. Iowa law, we have held, does not prohibit or bar the enforcement of contract clauses permitting termination without cause, except in cases of unconscionability. Although Corenswet alleged in its complaint that the contract term was unconscionable, it never pressed

11. The leading case applying the unconscionability doctrine to bar arbitrary termination of a dealership is *Shell Oil Co. v. Marinello*, 1973, 63 N.J. 402, 307 A.2d 598.

that issue, and the district court made no finding in that regard, as indeed it could not on the state of the record.[12]

Corenswet's rights with respect to termination extend only to a right to notice. The Amana contract permits termination on ten days' notice. Under the Code, section 2-309 (3), and under the *Drewrys* case, however, a distributor is entitled to reasonable notice. Section 2-309(3) of the Code states that "an agreement dispensing with notification is invalid if its operation would be unconscionable." But any claim that Corenswet might have based on inadequate notice would not entitle Corenswet to injunctive relief, for it appears from the *Drewrys* case and from *C. C. Hauff Hardware, Inc. v. Long Mfg. Co.*, 1965 257 Iowa 1127, 136 N.W.2d 276, that the manufacturer's failure to give proper notice is adequately remediable at law.

The district court's decisions are REVERSED, and the preliminary injunction is VACATED.

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12. Sometime between Corenswet's filing of the lawsuit and the hearing on whether to issue a preliminary injunction the unconscionability issue dropped from the case. The issues for the hearing were narrowed to include only the meaning of the contract and the reasons for Amana's termination of Corenswet. To prevail on a theory of unconscionability Corenswet would have to demonstrate (1) that it had no "meaningful choice" but to deal with Amana and accept the contract as offered, and (2) that the termination clause was "unreasonably favorable" to Amana. *Williams v. Walker-Thomas Furniture Co.*, 1965, 121 U.S. App. D.C. 315, 319, 350 F.2d 445, 449; *see also* E. Gellhorn, *supra*, at 510-513. The record evidence relevant to these questions is scanty. Sam Corenswet testified that Amana in 1969 aggressively sought Corenswet as a distributor and that he only reluctantly decided to commit his company to Amana. Another Corenswet witness, at one point in his testimony, said of the 1975 amended contract that, in view of Corenswet's heavy investment in the Amana line, "we had to take it." The court interupted that testimony and expressed its view that it was irrelevant to the hearing issues. There was no other evidence regarding the parties' relative bargaining power at the time the relationship began, nor any evidence as to the relative usefulness of the termination clause to the two sides.

Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Office of the Clerk

Edward W. Wadsworth
Clerk

Tel. 504-589-6514
600 Camp Street
New Orleans, La. 70130

May 30, 1979

TO ALL PARTIES LISTED BELOW:

NO. 77-1538 - CORENSWET, INC. v. AMANA REFRIGERATION, INC.
NO. 77-3474 - CORENSWET, INC. v. AMANA REFRIGERATION, INC.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By s/ Sally Hayward
Deputy Clerk

cc: Mr. Charles M. Lanier
Messrs. John R. Carpenter
Stephen J. Holtman
Mr. Robert E. Barkley, Jr.
Messrs. Bernard D. Craig, Jr.
Michael B. Shteamer

APPENDIX B

Transcript of Proceedings held November 30, 1976

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

CORENSWET, INC.	CIVIL ACTION
versus	NO. 76-3256
AMANA REFRIGERATION, INC.	SECTION "C"

Transcript of proceedings held in the above-entitled matter on the 30th day of November, 1976, in the Courtroom Section "C", 500 Camp Street, New Orleans, Louisiana. The Honorable Alvin B. Rubin, District Judge, presiding.

APPEARANCES:

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REPORTED BY:

M. H. GAUDET, JR., CSR
Official U.S. Court Reporter
Section "C"

THE COURT:

Gentlemen, in just a few moments, I'm going to decide, while most of the people who are interested are in the Courtroom, the issue on this motion for a preliminary injunction.

Lawyers are not accumstomed to decisions thus reached. Their training and their habits lead them to the belief that things ought to be put aside for a period of time and then reduced to written form. And the practice of the Bar is that normally, after evidence, briefs would be submitted, and this would require a 30 or a 45-day period. Then the Court would reduce its reflections to written reasons, and because at the end of the time it got briefs the Court might be engaged in the trial of matters – as it has been everyday that you gentlemen are aware of – might not be able to do it instantly. So, it may take another 20, 30 days, and some day the Court will hand down written reasons. By that time, its memory of the evidence and of the litigants and of the testimony would have faded, because in the meanwhile, in the 30 days or 45 days it took to submit briefs and the 30 or 45 days it took the Court to prepare and hand down written reasons, it would have heard innumerable other witnesses and innumerable other cases, and it would be left to say, "Now, was Mr. X that short, fat guy with the glasses, or was he the tall, skinny one with the mustache, and was he the guy who impressed me favorably or unfavorably?"

In this case, I have, at this moment, as clear a recollection of the people who have testified and of the evidence as ever I will have; and, in addition, I have the notes that I have taken, which, while not shorthand, I think accurately reflect the course of the testimony. In addition, I have the help of the briefs, very good ones, that have been prepared in advance and that I have had a chance to study in advance.

Everyday in this Courthouse, we ask Juries who have had no training in the Law to decide momentous issues, issues on which businesses succeed or fail, on which men go to jail or stay out of jail without the benefit of 30 days or six months cogitation. They are asked to hear the evidence and decide, and they are laymen. They don't take notes. They don't have any training. So, if I cannot, after 31 years of full-time law practice and judging, not to mention some prior quasi-legal experience in the Army and elsewhere, can't do it, I suppose that we ought not to ask those Juries to do it.

It is true that if I waited, I would put out something that had more literary merit. It would have no solecisms which, perhaps, my oral remarks will have, and it will have the, apparently, erudition of some footnotes and some citations. But, I don't believe it would be any more accurate. I think it would be less so, and I think decisions, unlike wine, do not get better as they age. So, for these reasons, I am going to tell you exactly what I think and what's on my mind; and then, those who are aggrieved thereby may have a prompt appeal, and the whole process may be expedited.

I'm not going to deal with the issues in the order in which they were discussed by Counsel, because to me, there is one issue that is paramount. That issue is: What did the contract between Amana and Corenswet mean when it said that it may be terminated for any reason? The Counsel for Amana said that means for some reason, not for no reason. It means for a reason that is reasonable in nature, not capricious, arbitrary, and whimsical; but, it is not the kind of reason that would be good cause in the law where you can say "Good cause, indeed, exists; you have breached your contract, or you have done something other, something else that is sinful."

Counsel for Corenswet says, "No, it means that there must be legal cause." I don't think that "for any reason" means the same as "for just cause or legal cause." I think it means what I have attributed to Counsel for Amana, even though, perhaps, I may have overstated what he is willing to concede. I think it means for some reason, not for no reason. And, "by some reason" in this, I emphasize orally the word "reason." It means for something that appeals to the reason, to the mind, to the judgment, not for something that is arbitrary, capricious, wanton.

So, to me, the paramount issue in the case is whether or not some reason, any reason existed for the action that Amana took. And, in that regard, I guess I will resort to a parody of a little doggerel that is of Elizabethan origin, I believe, and the case boils down to this, and the view I take of the testimony, I shall shortly set forth more fully. "I do not like thee, Dr. Fell. The reason why, I did not tell. But, this I know and know full well. I do not like thee, Dr. Fell."

I do not believe that the reason advanced by Amana for the action it took was the real reason. I think that had there been fiscal irresponsibility or fiscal unaccountability, the sole judge of that would have been Amana, and I don't think that I would, in that instance, elect to say whether Corenswet's balance sheet was good enough or bad enough to justify credit. I'm not a banker. I'm not an economist, and I would not undertake, in any instance, to substitute my judgment for Amana's on whom it would do business with any more than I would undertake to tell a banker when he should or should not make a loan.

So, what I am trying to say, and I will try to give the reasons for it, is that if I were convinced that Amana, in good

faith, reached a judgment that Corenswet or Select Brands, which would be more proper in the case, that the kind of balance sheet it was looking at was fiscally irresponsible, and it reached that in good faith, I would say it was entitled to do that whether it was right or wrong, and I would not be the one to say, "You are wrong. They have a good balance sheet."

I believe, from a preponderence of the evidence, at this juncture, however, that that was not what Amana did. I believe Amana, in the person of Mr. Foerstner, who not only says he takes the responsibility for the decision but made the decision, decided he was going to terminate this franchise and he sought a pretext, and I believe the whole testimony, at least so far as I can judge, it indicates that what was done was not done in good faith for the reason advanced, fiscal irresponsibility, but was done solely to terminate a franchise for reasons I do not know why.

Now, those reasons might be good if they were advanced. They might be "any reason" within the meaning of the contract. They weren't given to me, and the reason that was given to me and the reason that was given to Amana was that "You haven't met our fiscal requirements." I call to mind the testimony. Several people have testified that in July before the meeting with Mr. Tolbert on Thursday of the dealership meeting, which is identified as Thursday, July 15th, Mr. Foerstner said, "We can't do business with you fellows. You are underfinanced. We have to make a change."

Now, while Mr. Foerstner says he didn't use those words, I believe that was the thought that was then expressed. Thereafter, a meeting with Mr. Tolbert was held, and thereafter something was prepared, and it was prepared by Mr.

Tolbert and was introduced as D-6 and it was signed by Mr. Tolbert and also by Mr. VanDerTuuck and by Mr. Haney and is dated July 23rd, 1976, and it doesn't say a thing about Amana regarding Select Brands or Corenswet as being underfinanced. It's quite specific in what is to be required. It says that Amana wants a $500,000 collateral chattel mortgage. It says that it wants a bank line of credit to be obtained by Corenswet sufficient to enable him to promptly meet all obligations to Amana. This amount is estimated to be at least $500,000, without regard to the financial requirements of their business. And it says, third, Corenswet will provide Amana with a guarantee or a letter of credit such to cover any exposure which Amana may have in excess of $500,000.

Now, it is correct, I believe, that this agreement does not specifically identify the amount of the bank line of credit, and thereafter, Corenswet did try to get a $200,000 or a $250,000 line of credit accepted, and negotiated for that. And Amana, in affect, said that wasn't enough, although frequently, the reference was that someone else than the person being addressed would have to make the decision. Amana, however, consistently notified Corenswet that what was required was a $500,000 line of credit, and the upshot was that before Amana ever gave notice to Corenswet of termination, Corenswet said, in the person of Sam Corenswet, "If this is what we need, we'll put it up." And Mr. Tolbert said that he had no doubt that Sam Corenswet would do that, based on his judgment of Sam Corenswet. In other words, he didn't treat this as a trifling thing or as a fraud.

Now, sometime prior to that, in a letter that went unanswered, Corenswet said to Amana, "Draw up the mortgage you want and we'll sign it." What then remained of the fiscal requirements? Well, we're told that "Corenswet didn't meet our projections," but no one testified about any other

projections, no one. I heard testimony from Mr. Foerstner, Mr. Tolbert that they thought Amana should have bigger sales in New Orleans, and they wanted a capacity for growth. But, they never set forth any figures beyond those which Corenswet indicated it would need. Mr. Foerstner said that he never understood that Amana's product sales in the form of accounts receivable were pledged to the bank, but the very financial statements on which Mr. Tolbert and Mr. Foerstner based their judgments in July disclosed this in the most transparent terms.

Now, something is made of the fact that the contract says that inventory will be pledged to Amana, but I think it is quite different to talk of inventory and accounts receivable, and there are none here in the Courtroom who would be so fatuous, I think, so as to confuse the two. They are different things. It's inventory as long as it remains in stock. We all know that. It's tangible, and you have title. It's accounts receivable after you sell it. Never orally or in writing after this July 23rd agreement did Amana say that this was not what it needed or that it needed more. There were two changes made in that July 23rd agreement. During the negotiations, Corenswet asked for more time to submit the financial statement and so forth; and the amount of the bank line of credit was made explicit. That was to be $500,000. In the meanwhile, for reasons for which I find no sufficient explanation, indeed, at a time prior to the July meeting, apparently, feelers went out to find out if there were other dealers in the New Orleans area who would be willing to handle the Amana line.

Now, that's not consistent to me with the notion of good faith and satisfaction with the dealer, and then the sudden denouncement; suddenly it appears that they had a bad line

of credit. It is suggested that the Amana position was deteriorating throughout the period of dealings. While I don't substitute my judgment on the financial statement, I must say that I did get a B. S. in Business Administration, and I did have a major in accounting, and I can, at least, read a financial statement. And, while it may not have improved sufficiently to satisfy Amana, it didn't deteriorate. It didn't get worse. It reflected constant profits.

Now, I say that not by way, again, of substituting my judgment for Amana's but by way of making the necessary decision that I must make, and that is whether Amana really was terminating Corenswet because its financial statement and its responsiveness to credit requirements were not sufficient or for some other reason than that I do not choose to tell.

At any rate, without finally deciding that issue on the merits, as I do not now need to, and as it would be inappropriate for me now to do, I think there is a substantial basis to believe that some reason sufficient in law to justify termination of the contract did not exist and that the fiscal reason advanced was a mere sham.

For this reason, it is unnecessary for me to deal with the question of whether under Iowa Law and the Uniform Commercial Code good faith in termination was required. However, in the event that the Court of Appeals should reach that issue, I say that I must conclude that, on the record as shown up to now, the requisite good faith required, in my opinion, by the Uniform Commercial Code did not exist. I believe that the Uniform Commercial Code requires conscious and good faith not only in the negotiation and execution of contract itself, but their termination, unless caprice

is expressly permitted as a cause. Here it is not.

Now, I want to touch on something that lurks in this case and that I think I need to touch on. I really can't believe, of course, that when Amana negotiated with Corenswet in '70 or thereabouts to take on its line that it intended to make a contract henceforth and forever with this corporation, no matter who might be its stockholders and what might ensue; and I don't mean to imply that. I think it was perfectly proper when Amana learned that the Corenswet family had sold its stock interest in Corenswet, Incorporated to Select Brands to take a look at Select Brands and see whether it wanted to do business with the corporation controlled by Select Brands and its stockholders. I don't think they had to accept Fred Schoenfelt, whether Fred Schoenfelt was the best or the worst man in the world. So, I think at that time there might, indeed, have been a reason to terminate the agreement for, but that reason was not used, although in 1973, an issue arose between the parties. It was pretermitted, and thereafter, for more than two years the contract was performed, apparently, to the mutual satisfaction of both parties. I think it was then too late to sieze on the transfer of stock ownership, however, as a reason. The time to object would have been earlier, absent something developing in the meanwhile that would make it apparent that there was some reason, not caprice, for objection.

I suppose that most of the background facts that give rise to this litigation are undisputed. I have plunged into the heart of the matter, but I will, at this stage, recite what I believe to be the background facts that are, I believe, as I said, largely undisputed.

Corenswet, Incorporated, which I have called "Corenswet"

is a Louisiana corporation, and it has its principal place of business in New Orleans.

Prior to 1972, it was controlled by local residents, Sam Corenswet, who testified in the trial, being one of the stockholders, together with members of his family. Mr. Corenswet testified that he did not himself own a majority stock interest. At some time in the fall of 1972, the controlling stock of Corenswet, Incorporated was acquired from the Corenswet family by Select Brands Industries, Incorporated, which is a Missouri corporation. And since that time, Corenswet, Incorporated has been, in effect, wholly controlled and owned by Select Brands.

Amana Refrigeration is an Iowa corporation. It is a wholly-owned subsidiary of Raytheon Company, which is a well-known national corporation.

Because of the diversity of citizenship, this Court has jurisdiction over the matter.

Amana is, and for many years has been, a well-known manufacturer of refrigerators and freezers which are generally categorized in the industry as "white goods" and other heavy appliance items such as air conditioners. I commented during the trial that, indeed, that what my wife at the present is shopping for is an Amana refrigerator, having some dissatisfaction with another brand that we had had some trouble with.

Corenswet, prior to '72, had been primarily engaged in the wholesale distribution business of appliances, and it had no white goods line, no major white goods lines. That is -- I said "prior to '72;" in fact, that was prior to '69 that it was

so engaged.

Excuse me just a moment.

In 1969, Amana's representatives communicated with Corenswet, and as a result of this communication and the negotiations between them, Corenswet became the Amana distributor; and the evidence is beyond dispute that it did, at least, a satisfactory job. Amana's witnesses testified that they were an average distributor, but the average must be very good, since Amana increased sales from about $200,000 its first year over $3,000,000, and, indeed, one reason for complaint that Amana found in the fiscal pretext was that they were growing too fast, couldn't handle this volume, increased the number of retail outlets in the distribution area from six to seventy-two.

The parties entered into a written franchise agreement, and which was later replaced by a franchise agreement dated July 5th, 1975 and is the one to which I have already referred, and it is that agreement, Exhibit P-1, on which I base my conclusions in this suit.

It is obvious that P-1, the July, 1975 agreement, does not run forever. As I think I have commented to Counsel on the record, the law contemplates no perpetual agreement. Every agreement has a term, and I suppose the law implies a reasonable term to any agreement that lacks a term.

So, I do not, by any implication, now suggest that Amana and Corenswet are bound inextricably one to another or death or corporate dissolution do them part. I do not face that issue at this time. I don't face the issue at this time how long this agreement shall run, shall it run forever, shall it run for ten years, shall it run for a reasonable time; and, if

for a reasonable time, what is reasonable.

On its face, however, the agreement implies that it runs at least until terminated for any cause or for breach of the agreement, that is, for any reason or for breach of the agreement. And since breach of the agreement has not been shown and any reason has not been shown, then it's still in force, and the notice to terminate it is ineffective.

That being so, what action should I take? Well, let us consider the pros and cons with respect to preliminary injunction. Would a preliminary injunction be inequitable? It is true that Amana has not invested a million dollars, as contended, in the performance of this agreement, because it's made some money. But, at the moment, it does have a net loss of something like $75,000 in this agreement, plus the possibility of the profits that it had hoped to gain. And it's worked on this line for something about seven years of effort. What does Amana have to lose in terms of equities? Well, the sales seem to be satisfactory, and no claim is made. The only question is whether it will be reasonably secured during the term of a preliminary injunction. No effort was made to show; there's no evidence from which I can conclude that if, at the trial on the merits, Corenswet loses, Amana will be able to get another satisfactory distributor or will suffer any loss in the development of its product line. So, I see no inequity in issuing an injunction and a good deal of equity in doing so.

What hardships are created? Well, if the injunction is not issued, it is evident that Corenswet will be faced with manifest fiscal hardships. It will have to lay off a number of people. There is no other comparable white goods line available to it. It has contracted for space that it will not need,

and it will suffer, according to the testimony, some stigma among dealers and others, as well as a potential loss of dealers not only for its Amana products, but for the other lines sold those dealers.

The evidence indicates, as offered by Corenswet and not contradicted by Amana, that if another distributor were selling white goods and Zenith products, that there would be a strong tendency for those distributors who want to keep the Amana line to switch their electronics line to Zenith. So, I see potential hardship to Corenswet in the denial of an injunction and no hardship to Amana in the granting of one.

Finally, is the injury irreparable? And what has been said on that is that well, all Amana will lose is money, and Courts are accustomed to measuring loss in money. It was put a different way. Courts are accustomed to determining lost profits. Well, frequently Courts must determine lost profits because there is no other way to measure damage. But, that doesn't mean because we must do this that the injury is irreparable. We measure the loss of a man's arm, or indeed, of a man's life in money not because this is reparation but because this is the only way the law has, not being able to restore the arm, to make recompence. That is not the same as saying if you have the chance, the opportunity of preventing loss of the arm that the loss of the arm is not irreparable. I do not believe that money is an adequate measure or can be adequately measured in advance in sufficiently precise measure to constitute reparation for the injury Amana would cause Corenswet if its franchise were now peremptorily terminated. I believe the injury is, in the light of the law, irreparable, although had it occurred, the law would make the best effort it could to repair it, that is, with money.

So, I think that there has been a showing of irreparable

injury sufficient to warrant the issuance of an injunction.

I raised the issue with the parties in advance of trial of whether the injunction would be enforceable, that is, whether the relationships between the parties was sufficient that there will be a constant friction. There is nothing in the evidence to indicate existence of such friction. There is a great deal in the evidence to indicate that so long as the dealings are between Sam Corenswet as manager of Corenswet and the Amana executives that those dealings can be cordial and reasonable.

There is one injury that Amana would suffer irreparably if I were to issue an injunction and it continued to do business, and that is that it might not get paid. Corenswet has indicated in oral argument its willingness to go beyond the requirements of the memorandum agreement, as a condition of the preliminary injunction, to be sure that Amana is paid.

I don't believe it would be in the interest of justice for me to say that, however, Corenswet must go on a cash basis.

I'm going to set forth what I believe to be the necessary conditions in general outline. If, then, Counsel cannot, after negotiation in good faith, reduce these two more concrete terms, I will be glad to spell out more concrete terms.

I believe Amana should give a collateral chattel mortgage on all Amana products in its inventory. I believe that the inventory should be on some sort of a reporting basis subject to the investigation of an accountant, an outside accountant appointed by the Court, if the parties cannot agree on one, who will periodically, say, every 30 days or every 15 days, if deemed necessary, check the amount of actual inventory to

determine what amount is, in fact, collateralized. In other words, the face amount of the collateral mortgage might be $500,000 or any other amount. The mortgage would, indeed, be good only for the amount actually in inventory; and if that happens to be $300,000, why, that would be the amount that it actually provides security for. And I think during the term of preliminary injunction, Amana should provide credit up to this amount, and that Corenswet must provide Amana with a bank letter of credit sufficient to cover any shipments to Amana in excess of this amount.

Now, if a million dollars is the total exposure, that will have to be $700,000. If the total orders are to be less than that, it would have to be whatever amount is the difference. But, the parties have dealt extensively with the million dollar amount as adequate to meet projections for this year, and I see no reason why it shouldn't be adequate, at least during the duration of a preliminary injunction.

The figures submitted to me show that the greatest amount that Amana was ever indebted to – that Corenswet was ever indebted to Amana was $773,000 and that was in the month of April, 1976. The next largest amount was $766,000 in June or May, and the next largest, $679,000 in June; and so, I would think that a total commitment thus made of one million dollars would be satisfactory. If that does not seem to be satisfactory, then I will entertain any reasonable motions to modify the order, because I had come back to a point I have made before, and I made it in some seriousness, not merely for the sake of makeweight, and that is, that I am not a credit manager. I am not a banker, and I'm not an economist, and I ought not to determine this,

financial solvency of the creditors for the debtor -- of the debtor for the creditor.

So, I will issue a preliminary injunction solely for the duration of this cause until such time as it shall be heard on the merits, preventing the termination of the July, 1975 agreement, conditioned on Corenswet furnishing the security that I've indicated in my oral reasons for judgment.

I will ask Counsel for the parties to negotiate on a form of judgment that will make this more precise and to prepare a proposed form of judgment, if they can agree on one. If they can't agree on one, then they are to reduce their differences to a concrete basis and I will hear their differences and try to resolve them.

Finally, in order that there may be not further delay, as soon as the judgment is entered, I will enter an order of appeal and I'll hear Counsel at this time with respect to the appropriate amount for a bond pending appeal.

If you'd rather be heard on it at a later time, I will do it later. I really just don't want to deprive anybody of his rights, of delaying his rights, so that if anyone is dissatisfied, they will be able to appeal the day I sign the judgment. I'll sign the order of appeal that day.

MR. O'KEEFE:

Your Honor, if we could, though, raise a question with regard to the amount of the bond provided by the plaintiffs, we will do that at a later time prior to the signing of the

judgment.

THE COURT:

All right. There are two bonds, of course, to be posted. One is the bond to be posted for the preliminary injunction, if any. I'm not sure the law requires such a bond, but I'll hear Counsel on that, and the other is the bond for appeal.

MR. O'KEEFE:

I understand.

THE COURT:

It seems to me that, in either event, a bind substantially for costs ought to be adequate, since I am not aware of any dollar injury that the enjoined party will suffer during the appeal. But, if there is any, I, of course, should make the bond adequate to cover it.

All right. I do want to ask if there is anything of a factual nature that I have not discussed that you gentlemen think I should make findings on for appellate purposes, because I know it is disconcerting to have the Court of Appeal ask, "Well, what did the trial court find on this?" Only to be told, "Well, the trial court didn't find on this," and then to be suggested! "Well, maybe you ought to go back for another hearing and have him make some findings."

First, if there is anything that occurs to Counsel at this time that I should make findings on that I haven't, I will right now.

Finally, or secondly, if, tomorrow, something occurs to either of you that you think I ought to make findings on that I haven't found, I'll make those findings tomorrow or as soon as you let me know what it is you think I ought to make findings about.

MR. BARKLEY:

Your Honor, we can think of nothing at this time.

THE COURT:

Well, I'm reserving your rights.

MR. O'KEEFE:

Nor the defendants.

THE COURT:

I'll reserve your rights.

Now, I do want to ask you gentlemen to do one thing for me. I'm going to return to you the various exhibits that you furnished me during the trial. It will be necessary, sooner or later, for me to hear this matter on the merits, and these same exhibits, obviously, are to serve. I would like for you simply to take those exhibits and complete your exhibit books; that is, put those that I've been handed in loose form during the trial into your respective exhibit books so they'll be complete for the final trial. We don't have to supplement them anymore.

MR. BARKLEY:

The ones that -- does that include the ones that were actually in evidence, or are those your copies?

THE COURT:

Those are just my copies. Miss Perkins will take the ones that are in evidence. But, I do think you'd best check with her on the record copies. I'm going to send for her at this time.

I will say one or two more things for the record, gentlemen.

I don't know. I never know – no trier of fact ever known – whether the view I have taken of the facts, whether the view I have taken of the evidence is right or wrong. It would be a fool who sat here day after day hearing law suits who thought he had an immutable test by which he could determine truth from error, and the law doesn't suppose that Judges are ever error-free.

I suppose all of us ought to know, and some of us really do know that we're just mortal human beings who have to make a decision. We make it on what is presented to us in Court. We may get a distorted view in Court of what has happened somewhere else at some other time. So, I don't mean to imply by my judgment of what has happened that they are infallible judgments with respect to people or that they stigmatize anybody or, except for the fact that I have, and the degree that I have praised the lawyers for briefs, that they

praise anybody. They are the facts as I see them, to the best of my ability, and that's all they are. And I don't purport to make them more than that, and that's why I encourage you to file promptly any appeal you may have if either of you is dissatisfied in any way with the outcome on the preliminary injunction, as you have a perfect right to do.

Miss Perkins, the litigants will give you – check with you on exhibits to be sure the record is complete.

We'll show that judgment will be entered for the plaintiff for oral reasons assigned, issuing a preliminary injunction, the injunction to be in form to be prepared by Counsel and submitted to the Court in accordance with oral reasons given.

Thank you very much, gentlemen.

MR. BARKLEY:

One question, Your Honor.

On the requirements of the letter of credit to be given by Corenswet to Amana, was that letter of credit to be in the amount of one million dollars, or was it to be in the amount– in an amount for the difference between the inventory and the one million dollars?

THE COURT:

The difference between the inventory and one million dollars.

MR. BARKLEY:

All right.

THE COURT:

Now, that, obviously, is an amount that is not readily determinable at that time. It may be approached in one of several ways. For example, Amana might simply agree that it will never let its inventory fall below $300,000. The Special Master will check to be sure that's so; and, in that event, $700,000 is the amount of the letter of credit.

MR. BARKLEY:

I just wasn't clear on the requirement.

* * * * *

REPORTER'S CERTIFICATE

The undersigned certifies, in his capacity of Official Court Reporter for the United States District Court, Eastern District of Louisiana, the foreoing to be a true and correct transcription of his Stenograph notes during the proceedings in the above-numbered entitled cause on the 30th day of November, 1976.

New Orleans, Louisiana, this 28th day of December, 1976.

S/ M. H. Gaudet, Jr., CSR
M. H. GAUDET, JR., CSR
Official U.S. Court Reporter
Section "C"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CORENSWET, INC., Plaintiff	CIVIL ACTION
versus	NO. 76 - 3256
AMANA REFRIGERATION, INC.,	SECTION "C"

(Filed: Mar 1, 1977)

PRELIMINARY INJUNCTION

This cause came on for hearing on Plaintiff's Motion for Preliminary Injunction. The Court having considered the verified Complaint, the entire record, including oral testimony and documentary evidence introduced during the hearing, and the briefs and oral arguments of counsel, rendered its findings of fact, conclusions of law, its decision and reasons therefor in open court on November 30, 1976, specifying that a written judgment would be entered subsequently.

In accordance with the decision rendered in open court on November 30, 1976, the Court has concluded that Plaintiff is entitled to a Preliminary Injunction enjoining Defendant from terminating its Distributor Agreement with Plaintiff.

The first element to which the Court must direct its attention for purposes of determining Plaintiff's entitlement to a Preliminary Injunction is whether or not there exists a substantial likelihood that Plaintiff will prevail on the merits.

This determination, in turn, centers in the first place around an interpretation and application of the termination provisions provided in the Distributor Agreement entered into by the parties dated July 5, 1975. That Agreement provides, in pertinent part, that either party may terminate the Agreement "for any reason" upon the giving of ten (10) days prior notice. Plaintiff maintains that the term "for any reason" means that the Agreement can only be terminated for legal cause or good cause. Defendant argues that the words "for any reason" mean that the Agreement can be terminated for any reason – be that reason good, bad or indifferent. The Court finds that the proper interpretation to be given to the words "for any reason" requires that there be some "reason" for the Agreement's termination, and that it cannot be terminated arbitrarily, capriciously, wantonly or for no reason at all. "For any reason" does not mean the same as "for just cause or legal cause." It means for some reason, not for no reason, and "for some reason" means for something that appeals to the reason, to the mind, to the judgment, not for something that is arbitrary, capricious or wanton. Based upon the foregoing, the Court concludes that Plaintiff has established by a preponderance of the evidence a substantial likelihood of success on the merits in that the Court does not believe the reason advanced by Amana for its alleged termination was the "real reason" for the attempted termination. In other words, the reason advanced by Defendant was a mere pretext which is insufficient to constitute a termination "for any reason" within the meaning of the contract terms. Accordingly, Plaintiff has met its burden of proof in establishing that the alleged termination was wrongful and that Plaintiff has a substantial likelihood of success on the

merits.*

Plaintiff has also proven by a preponderance of the evidence and the Court has also found the following:

1. Defendant would terminate the Agreement according to its September 14, 1976 Letter of Termination, cease selling and delivering products to Plaintiff pursuant to the Agreement, and appoint another Distributor for the geographical area covered by the Agreement unless it is enjoined from doing so.

2. Plaintiff would suffer irreparable harm, injury and loss and does not have an adequate remedy at law if Defendant is allowed to terminate the Agreement, if Defendant appoints another Distributor for the geographical area, or any part thereof, covered by the Agreement or if Defendant ceases to sell and deliver products to Plaintiff pursuant to the Agreement. The irreparable harm, injury and loss consists, among other things, of loss of expected profits which cannot be measured with any degree of reasonable accuracy.

3. Balancing the hardships to the parties, the equities require granting a Preliminary Injunction for the reasons, among others, that otherwise Plaintiff will suffer the loss of

* The finding herein pretermits any necessity for this Court to determine whether Iowa law (which the parties agree is controlling) mandates that any termination of this Agreement be accomplished in good faith as that term is used in the Uniform Commercial Code. Although the Court need not reach that issue, the Court has made findings and conclusions in that respect in the event that issue is reached by the Court of Appeals. The Court concludes that the Uniform Commercial Code requires good faith in order to terminate the Agreement. The record establishes and the Court finds that the Defendant did not act with the requisite good faith.

the benefits of its efforts and expenditures over the years to develop the market for Defendant's products, Plaintiff will be required to discharge some of its personnel, Plaintiff will be exposed to the potential loss of other business, and Plaintiff does not have available to it a similar product line. The only potential hardship to which Defendant will be exposed if the Preliminary Injunction is granted is the possibility that Plaintiff will not pay Defendant for the products sold and delivered to Plaintiff pursuant to the Agreement. Pursuant to the instructions of the Court the parties have agreed upon the security to be furnished by Plaintiff to Defendant for the purchase of Defendant's products by Plaintiff. A copy of that Agreement, together with a copy of a letter agreement thereto from counsel for Defendant to counsel for Plaintiff, are annexed hereto and made part hereof as Exhibit "A". That Agreement clearly eliminates the only potential hardship to which Defendant is exposed by the Preliminary Injunction herein granted.

Accordingly, IT IS ORDERED that Defendant Amana Refrigeration, Inc., its officers, employees, agents, representatives and attorneys and anyone acting in concert or participation with or for or on behalf of them or any of them be, and they are hereby, restrained and enjoined, pending the final determination of this action, and subject to the further orders of this Court, from terminating or attempting to terminate the Distributor Agreement between Amana Refrigeration, Inc. and Corenswet, Inc., from appointing or attempting to appoint anyone else to act as distributor of the Amana products stipulated in the Distributor Agreement within the territory defined in the Distributor Agreement and, subject to the terms and conditions of the Distributor Agreement

and the recitals of and the limits contained in the stipulation above mentioned from refusing to sell or deliver to Corenswet, Inc., Amana products ordered by Corenswet, Inc. from Amana Refrigeration, Inc., pursuant to the Distributor Agreement between them dated July 5, 1957, provided that (a) if there be some reason for termination occurring after the date of the hearing Amana Refrigeration, Inc., may apply for an order vacating this injunction for cause and seek a prompt hearing thereon; and (b) if there be some reason for appointment of another distributor to serve the same geographic territory as Corenswet for the products mentioned in the Distributor Agreement, Amana Refrigerator, Inc. may apply for an order permitting this and seek a prompt hearing thereon.

IT IS FURTHER ORDERED that the bond in the amount of Fifteen Thousand Dollars ($15,000.00) filed by plaintiff for issuance of the temporary restraining order in this action shall remain in force and effect, subject to the further orders of this Court, as security for such costs and damages as may be incurred or suffered by defendant if it is finally determined that defendant was wrongfully restrained and enjoined.

New Orleans, Louisiana, February 28, 1977.

s/ Alvin B. Rubin
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CORENSWET, INC.	CIVIL ACTION
VS.	NO. 76-3256
AMANA REFRIGERATION, INC.	SECTION "C"

(FILED: Aug 22, 1977)

CLARIFICATION AND MODIFICATION ORDER

This cause came on for hearing on July 6, 1977 on the motion by defendant, Amana Refrigeration, Inc. Having considered the record and the memoranda and exhibits filed in support of the motion, and having heard the oral arguments of counsel, the Court now ORDERS that:

(1) The defendant, Amana Refrigeration, Inc., may, without violating the preliminary injunction issued by this Court on February 28, 1977, tender to the plaintiff, Corenswet, Inc., and request execution by it of a new standard form of Appliance Distributor Agreement, in the form annexed as Exhibit "B" to the affidavit of Steven R. Gustafson dated June 9, 1977.

(2) The preliminary injunction issued on February 28, 1977 remains in full force and effect.

(3) If Corenswet, Inc. executes the new standard form of Appliance Distributor Agreement, that agreement shall be subject to the terms of the injunction issued herein on

February 28, 1977, and it cannot be terminated in violation of the terms of that injunction.

Nothing contained herein shall constitute a determination by the Court of the effect, if any, of a failure or refusal of Corenswet, Inc. to execute the proposed agreement on the rights and obligations of the parties under the existing agreement between them.

Boston, Mass., this 18 day of August, 1977.

s/ Alvin B. Rubin
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CORENSWET, INC.	CIVIL ACTION
VERSUS	NO. 76 - 3256
AMANA REFRIGERATION, INC.	SECTION "C"

(FILED: Nov. 18, 1977)

CLARIFICATION AND MODIFICATION ORDER

This cause came on for hearing on October 5, 1977, on the following motions:

1. Motion of Defendant Amana Refrigeration, Inc. to Modify and Vacate Injunction to Grant Leave to Declare Termination of Distributor Agreement;

2. Motion of Corenswet, Inc. for Partial Summary Judgment;

3. Motion of Plaintiff Corenswet, Inc. to Dismiss Amana's Motion to Modify and Vacate the Preliminary Injunction; and

4. Motion of Plaintiff Corenswet, Inc. to Recall, Annul, Vacate and Set Aside, and, Alternatively, Reconsider Clarification and Modification Order.

Having considered the record and the memoranda and exhibits filed in support of the motions, and having heard the

oral arguments of counsel, the Court now ORDERS that:

(1) Defendant's Motion to Modify and Vacate Injunction to Grant Leave to Declare Termination of Distributor Agreement is denied.

(2) Plaintiff's Motion for Partial Summary Judgment is denied without prejudice.

(3) Plaintiff's Motion to Dismiss Amana's Motion to Modify and Vacate the Preliminary Injunction is denied.

(4) Plaintiff's Motion to Recall, Annul, Vacate and Set Aside, and, Alternatively, Reconsider Clarification and Modification Order is denied.

(5) The Preliminary Injunction issued on February 28, 1977, remains in full force and effect, except as it may be modified by the terms of this order.

(6) If Corenswet, Inc. does not sign the new standard form of Appliance Distributor Agreement, in the form annexed as Exhibit "B" to the affidavit of Steven R. Gustafson dated June 9, 1977, within five days after the date of this Order, Amana Refrigeration, Inc. may seek leave to terminate its existing distributor agreement with Corenswet, Inc.

(7) If Corenswet, Inc. signs the new standard form of Appliance Distributor Agreement within five days after the date of this Order, that Agreement and any renewal shall be:

(a) terminated only for reason; and,

(b) subject to the requirements of the injunction issued on February 28, 1977, as to appointment of

another distributor to serve the same geographic territory as Corenswet, Inc.; and to the requirements of that injunction with respect to refusing to sell or deliver products.

(8) If Corenswet, Inc. signs the new standard form of Appliance Distributor Agreement within five days after the date of this Order, Amana Refrigeration, Inc. cannot terminate or fail to renew that Agreement or any renewal thereof without both reason, as that term is defined in the injunction issued herein on February 28, 1977, and an order of this Court authorizing such termination or non-renewal; but Amana Refrigeration, Inc. may, upon showing that it has terminated other distributors, seek a further modification of that injunction, as modified herein, to permit termination of Corenswet, Inc., on the same basis actually being used with respect to other distributors, whether such action with respect to other distributors is with or without reason.

(9) If Corenswet, Inc. signs the new standard form of Appliance Distributor Agreement within five days after the date of this Order, the provisions contained in Article XII(7) of that Agreement or any renewal thereof shall not be enforceable should Amana Refrigeration, Inc. terminate the Distributor Agreement with Corenswet, Inc., without reason or on some basis that does not accord like treatment to Corenswet, Inc., and other distributors.

Dated at New Orleans, Louisiana, this 18 day of November, 1977.

s/ Alvin B. Rubin
FIFTH CIRCUIT JUDGE*

*Sitting as U.S. District Judge by designation of Chief Judge John R. Brown.

Reasons for issuance of November 18, 1977 clarification and modification order

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CORENSWET, INC.	CIVIL ACTION
VERSUS	NO. 76-3256
AMANA REFRIGERATION, INC.	SECTION "C"
	(FILED: Nov. 17, 1977)

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Attorneys for Defendant

RUBIN, Circuit Judge*

On February 28, 1977, the court issued a preliminary injunction enjoining the defendant, Amana Refrigeration, Inc., (Amana), from terminating or attempting to terminate without reason its distributor agreement dated July 5, 1975 with the plaintiff, Corenswet, Inc. (Corenswet). On August 18, 1977, a "Clarification and Modification Order" was signed permitting Amana to submit a new distributor agreement to Corenswet for execution within the terms of the prior injunction. The plaintiff now seeks permanent relief by moving for partial summary judgment on issues raised in its suit for a preliminary injunction. Three other motions are pending by both parties seeking in some way to alter or recall the

"Clarification and Modification Order" because of events that occurred after February 28, 1977. For reasons set forth below, all the pending motions are DENIED. However, the February 28, 1977, injunction will be MODIFIED further to clarify the rights of the parties with respect to Amana's submission to Corenswet of a new distributorship agreement.

I.

The plaintiff, Corenswet, has moved for partial summary judgment in this action. The motion is premature. Amana has appealed the preliminary injunction to the Fifth Circuit Court of Appeals. Deciding a motion for partial summary judgment prior to the Court of Appeals' decision on the preliminary injunction will neither advance the course of justice, nor conserve the time and resources of the parties or of the court. Should this court's resolution of those issues raised in the suit for a preliminary injunction be judged in error, any favorable decision rendered now on the plaintiff's motion would prove pointless. Conversely, a Court of Appeals decision favorable to Corenswet would no doubt expedite the plaintiff's suit for permanent relief in this court at the appropriate time. Consequently, Corenswet's motion for summary judgment is DENIED WITHOUT PREJUDICE as premature.

II.

On April 20, 1977, subsequent to the issuance of the preliminary injunction, Amana submitted to Corenswet a new distributorship agreement. The agreement purported to be a one-year agreement, to take effect on January 1, 1977, and on December 31, 1977, to:

> . . . automatically expire without any action by either Amana or Distributor, unless sooner terminated as hereinafter set forth.

The agreement further provided:

> XII. TERMINATION:
>
> * * *
>
> 7. Neither Amana nor the Distributor shall, by reason of the termination, expiration or non-renewal of this Agreement, be liable to the other for any damages or injunctive relief of any kind, including but not limited to, compensation, reimbursement or damages on account of loss of prospective profits on anticipated sales, or on account of expenditures, investments, losses, or commitments in connection with the business or good will of Amana or the Distributor.

Taking the position that, under the February 28 injunction, Corenswet could not be forced to agree to these terms in order to continue its distributorship, Corenswet refused to sign the agreement. Amana subsequently moved for a modification and clarification of the injunction to permit it to submit its new agreement to Corenswet. Following a hearing on July 6, 1977, the requested modification was granted.

Notwithstanding the court's "Clarification and Modification Order," Corenswet has refused to sign the new agreement submitted by Amana. It has instead filed a motion, styled"Motion to Recall, Annul, Vacate and Set Aside and,

Alternatively, Reconsider Clarification and Modification Order," asking that the order be set aside on two grounds: first, that the court lacks jurisdiction to hear Amana's motion to modify the preliminary injunction because Amana has appealed the injunction; and, second, that the submission of a new agreement is a subterfuge to enable Amana to terminate its relationship with Corenswet without literally violating the February 28 injunction.

Any doubt as to jurisdiction has been removed by an order of the Court of Appeals granting leave to Amana to file its motion for modification pending appeal, as well as a second motion to be considered below. Corenswet, Inc. v. Amana Refrigeration, 5th Cir. Oct. 14, 1977, Civ. No. 77-1538.

The court cannot assume simply from the terms of the agreement that it represents a subterfuge aimed at ending Amana's relationship with Corenswet. Amana submitted the new agreement to its sixty-four major appliance distributors, sixty-three of whom agreed to sign. As the court said during the July 6 hearing prior to granting a modification of the injunction, the February 28 order was not intended to guarantee Corenswet a perpetual contract with Amana under the terms of its 1975 agreement. Transcript, Corenswet, Inc. v. Amana Refrigeration, Inc., E.D. La. July 6, 1977, 7. The court intended only to prevent Amana from terminating its relationship with Corenswet without any reason, and to insure that Amana treats Corenswet fairly and non-discriminatorily when Amana's dealings with all of its other distributors are considered.

Consequently, Corenswet's motion to set aside the August 18 "Clarification and Modification Order" is DENIED.

III.

Because Corenswet refused to sign the new distributorship agreement, Amana insists it has reason to terminate its relationship with Corenswet, and has filed a "Motion to Modify and Vacate Injunction to Grant Leave to Declare Termination of Distributor Agreement." Amana urges further that Corenswet's filing of a second action seeking declaratory and injunctive relief with respect to the new distributor agreement constitutes "disruptive, uncooperative, and contentious conduct" that itself is reason for terminating their business relationship.

Corenswet has moved that this motion be dismissed for lack of jurisdiction pending appeal. As stated in Section II, *supra*, the Court of Appeals order permitting Amana to file its motion moots the dispute as to jurisdiction. Corenswet's motion to dismiss Amana's motion for lack of jurisdiction is DENIED.

In issuing its "Clarification and Modification Order" of August 18, 1977, the court sought to establish two things: first, that the submission to Corenswet of a new distributor agreement would not itself breach the terms of the February 28 preliminary injunction; and, second, that were Corenswet to sign the new agreement, the February 28 injunction would continue to govern the relationship of Corenswet with Amana. Given the parties' uncertainty as to their rights respecting one another and the obvious animus by Amana's president against Corenswet's controlling shareholder that has tainted their relationship, it is apparent that further elaboration is necessary to clarify the meaning of the modification of the injunction. It has not been shown that Corenswet's

refusal to sign the new agreement proceeded from anything but genuine uncertainty as to what would be its rights under that agreement. Consequently, neither its refusal to sign, nor its attempt to seek further declaratory relief from the court can be viewed as a reason for permitting Amana now to terminate its relationship with Corenswet. Hence, Amana's motion to modify and vacate the injunction to permit termination is DENIED.

IV.

In order to eliminate any uncertainty as to the parties' present rights, it is necessary to reiterate the principles that underlie the February 28 injunction.

First, as the court has said repeatedly, Corenswet is not entitled to a permanent relationship with Amana on the terms of its 1975 distributor agreement. Consequently, so long as the submission to Corenswet of a new distributor agreement does not constitute unfair or discriminatory action, there is no reason to restrain Amana from submitting a new agreement.

Second, although Amana may terminate its relationship with Corenswet for a reason, that reason must be genuine. It must be "a reason that is reasonable in nature, not capricious, arbitrary, and whimsical." Transcript, Corenswet, Inc. v. Amana Refrigeration, Inc., E.D. La., November 30, 1976, 4. This requirement prevails under the 1975 agreement between Amana and Corenswet, and it will likewise be a condition to termination of the new agreement, if Corenswet signs it.

Third, the principles behind the injunction apply notwithstanding any provision in the new agreement for automatic expiration. Once the agreement expires Amana can terminate its relationship with Corenswet only if such termination is fair and non-discriminatory in view of Amana's dealings with its other major distributors. If Amana decides to terminate Corenswet and not to terminate other distributors, it must do so for a reason, as that term has already been defined in this litigation. The injunction is not intended to bar termination of the relationship where a genuine reason exists with respect to Corenswet, in particular, or where such termination is fair under all the relevant circumstances. The injunction is intended to bar termination without reason, and the court will not permit Amana to accomplish this indirectly through any provision of the new agreement. Should it be shown at some future time that Amana is in fact terminating its agreements with other distributors without reason, it may then be appropriate for Amana to seek the same rights with respect to Corenswet.

Counsel for both parties were directed at a hearing on October 5, 1977, to draft and submit a modification order permitting Amana to tender to Corenswet a new agreement identical in terms with those agreements signed by Amana's other major distributors. The order shall also provide that Corenswet will have five days following entry of the order to decide whether to sign. If Corenswet does not sign the new agreement within five days, Amana may seek leave to terminate. The preliminary injunction of February 28 shall

be MODIFIED as thus ordered.

s/ Alvin B. Rubin
UNITED STATES
DISTRICT JUDGE*

New Orleans, Louisiana
November 15, 1977
(Initialed) ABR

* Sitting as District Judge by designation of Chief Judge John R. Brown.